

Antideficiency Act—31 U.S.C. § 1341

§ 1341. Limitations on expending and obligating amounts

(a) (1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

Open-Ended Indemnification Clauses: Issues and Perspectives

Frequently Asked Questions

1. What is the rule regarding open-ended indemnification clauses?

The rule is that an agency may not agree to an open-ended indemnification clause because such agreements violate both the Antideficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11. By entering into an agreement to indemnify where the amount of the government's liability is indefinite or unlimited, an agency has exposed itself to liability in excess of any appropriation. This rule was first recognized by the Comptroller General's predecessor, the Comptroller of the Treasury, in 1909. 15 Comp. Dec. 405 (1909). Numerous subsequent GAO and court decisions have followed the rule, and the Supreme Court endorsed it in 1996. *Hercules, Inc. v. United States*, 516 U.S. 417 (1996).

A typical open-ended indemnification clause might read as follows:

“Each party (the “Indemnifying Party”) agrees to indemnify the other party (the “Indemnified Party”) from any claim, damage, loss, expense, liability, obligation, or cause of action which the Indemnified Party sustains or may sustain or pay, by reason of any act or omission by the Indemnifying Party.”

This is an open-ended indemnification clause because the amount of any indemnification that might be paid by either party to the other is impossible to gauge at the time of the agreement. One party might have to pay millions of dollars at some later date, or perhaps neither party will ever have to pay. This clause is written broadly enough so that the Indemnifying Party may have to reimburse the Indemnified Party for any costs the Indemnified Party incurs due to an act or omission on the part of the Indemnifying Party, including payments resulting from third-party claims.

Hercules, Inc. v. United States, cited above, offers an illustration. The plaintiffs in that case were chemical companies who contracted with the Department of Defense in the 1960s to manufacture Agent Orange, the defoliant used extensively by U.S. forces in the Vietnam War. Use of the defoliant exposed U.S. soldiers to dioxin, a toxic ingredient of Agent Orange. Years after the war ended, many veterans and their families sued the chemical companies to recover for injuries suffered from contact with dioxin. After settling hundreds of claims, the chemical companies sued the government, arguing that the circumstances surrounding formation of the contracts between the chemical companies and the Department of Defense gave rise to an implied-in-fact indemnification agreement in favor of the chemical companies.

The Supreme Court refused to find an implied-in-fact indemnification clause, because such a clause would have been open-ended, and therefore in violation of the Antideficiency Act.

2. Does this rule apply to all indemnification clauses?

No. Agencies sometimes have statutory authority to enter into open-ended indemnification agreements. For example, the Price-Anderson Act, 42 U.S.C. § 2210, authorizes the Nuclear Regulatory Commission and the Department of Energy to indemnify licensees, contractors, and other owners and operators of nuclear facilities for claims resulting from nuclear incidents.

If the amount of the government's liability under an indemnification clause can be ascertained at the time of the agreement, the agreement is not open-ended, and so long as the agency has budget authority to cover the potential liability, the agency will not run afoul of the Antideficiency Act. Some examples follow. The common thread of these examples is that the agency is in control of its liability.

- **The government's liability under the indemnification agreement is "capped."**

When an indemnification agreement provides that the government will indemnify only up to a certain amount, the government's maximum liability is known, and the agency signing such an agreement does not violate the Antideficiency Act so long as the agency has budget authority to cover that amount. For example, an agency may expressly agree to indemnify up to, for example, \$50,000. So long as the agency, upon signing the agreement, has \$50,000 of available budget authority, this agreement is in accord with the Antideficiency Act.

Similarly, an agency may indemnify up to the amount of the other party's insurance deductible, as this amount is known at the agreement's inception. *National Railroad Passenger Corp. v. United States*, 3 Cl. Ct. 516 (1983).

- **The agreement provides that the agency will indemnify for damage to specified property.**

When the agreement specifies that the agency will indemnify the other party for damage to specific items of property, the maximum liability to the agency is the value of the property in question. For example, the Selective Service did not violate the Antideficiency Act when it agreed to indemnify private bus companies for damage to their buses incurred while transporting Selective Service registrants to physical examinations. 48 Comp. Gen. 361 (1968). Since the maximum liability was the value of the buses, the agreement was not open-ended. *Id. See also* 42 Comp. Gen. 708 (1963); 22 Comp. Gen. 892 (1943). Again, the agency must have sufficient budget authority to cover the amount of its liability.

- **The occurrence of events that would require the government to pay indemnification is solely in the hands of the government.**

In 63 Comp. Gen. 145 (1984), we considered the propriety of an indemnification agreement appearing in several Navy leases for ships. The agreements provided that the Navy would indemnify the lessors for increased tax liability the lessors might incur should the Navy require certain improvements to the ships. Although the amount of the tax liability the lessors might incur was unknown at the time of the agreements and the indemnity therefore appeared to be open-ended, we determined that because the Navy's indemnification liability would arise only upon action by the Navy, the Navy could choose to forgo such action to avoid any Antideficiency Act violation.

3. Are there any exceptions to the rule?

GAO has one decision recognizing an extremely narrow exception to the rule, 59 Comp. Gen. 705 (1980).

The exception applied to agreements between the General Services Administration (GSA) and public utility services, whereby GSA indemnifies the utilities for losses the utilities might incur while working on utility lines in GSA-owned buildings. We determined that GSA could enter into open-ended indemnification agreements because:

- a. GSA could procure utilities from no other source but the public utility companies;
- b. all other utility company customers signed these agreements; and
- c. the utility included these provisions in its agreements only after administrative proceedings in which GSA, like other utility customers, had the opportunity to participate.

GAO has never expanded this exception beyond the facts presented in the decision. In subsequent decisions, we have determined that the government could not sign similar agreements with utilities because the facts presented were different from those in 59 Comp. Gen. 705. For example, the Architect of the Capitol would have violated the Antideficiency Act if it agreed to a clause in a contract with an electric utility to indemnify the utility for injuries to the utility's employees when they inspected electrical lines in the Architect's buildings. B-197583, Jan. 19, 1981. Unlike GSA, the Architect could acquire line inspection services from a source other than the utility; indeed, the Architect's own employees had performed inspections in the past. *Id.* See also B-260063, June 30, 1995.

4. What if a vendor insists on including an open-ended indemnification clause in the contract?

Often when an agency asks a vendor to strike an open-ended indemnification clause from a proposed agreement, the vendor agrees and the agreement is signed. Sometimes, however, the vendor balks at having no indemnification or having its indemnification capped. When confronted with this situation, agencies have employed various methods to overcome the vendor's reluctance while, at the same time, steering clear of an Antideficiency Act violation.

- Some agencies insert, in lieu of an open-ended indemnification agreement, a clause providing that the agency will indemnify up to the amount of available appropriations at the time any claim for indemnification arises.

GAO has a line of decisions stating that, while such clauses follow the letter of the law with respect to the Antideficiency Act, the use of such clauses could have dire consequences for an agency. *E.g.*, B-242146, Aug. 16, 1991; 62 Comp. Gen. 361 (1983). For example, if a claim for indemnification arises at the beginning of a fiscal year, an agency may wipe out the remainder of its appropriation paying the claim. GAO has advised that agencies use these clauses at their peril.

- Agencies occasionally strike a proposed open-ended indemnification clause from a contract and replace it with different language that addresses the contractor's concerns. For example, the Department of Commerce uses the following "replacement clause" in property leases:

"The Government agrees to promptly consider and adjudicate any and all claims which may arise out of use of the Lessor's property by the Government, duly authorized representatives, or contractors of the Government, and to pay for any damage or injury as may be required by Federal law. Such adjudication will be pursued under the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq., or such other legal authority as may be pertinent. The Government also agrees to consider and adjudicate any claims for property damage or personal injury sustained by Government personnel in the performance of their official duties while on the Lessor's property. Such adjudication will be pursuant to the Federal Tort Claims Act, the Federal Employees Compensation Act, 5 U.S.C. Section 8101 et seq., or such other legal authority as may be pertinent."

available at www.ogc.doc.gov/gen_law.html

While there is no case law addressing the Antideficiency Act implications of such a clause, use of the clause instead of an open-ended indemnification clause may avoid an Antideficiency Act violation.

- Some agencies, when dealing with a vendor demanding open-ended indemnification, have chosen to hire a third party from the private sector as a sort of intermediary. This third party enters into a contract with the vendor to procure for itself the goods or services sought by the agency. As a private company, this third party is not subject to the Antideficiency Act, so it can enter into an open-ended indemnification agreement. The third party then signs a separate contract with the agency through which the agency acquires the goods or services it originally sought from the vendor. The third party factors into its contract with the agency the costs the third party incurred in its open-ended indemnification with the vendor, for example, the cost of insurance to indemnify the vendor.

For example, an agency seeking to acquire conference space from a hotel encountered a hotel demanding that the agency sign an open-ended indemnification clause. To avoid Antideficiency Act problems, the agency engaged a private event planner to contract for services in planning and conducting its conference, including the location and procurement of conference space. The event planner included in the contract price its anticipated costs of indemnifying the hotel. The event planner then negotiated on its own with the hotel for conference space, and signed a contract with the hotel that included an open-ended indemnification clause.

While there is no case law addressing the Antideficiency Act implications of such an arrangement, this type of arrangement seems to avoid an Antideficiency Act violation, because the agency has no privity of contract with the hotel seeking indemnification. With this type of arrangement, the agency is not indemnifying anyone. Of course, agencies should not engage a third party to accomplish a task that the agency is statutorily precluded from performing itself.

- Agencies may pay for the other party's insurance premium as part of the contract cost.

Agencies may properly pay the costs of another party's insurance premiums if the parties agree to include the cost of the premiums as part of the contract cost. Some agencies have told us that, when they inform private parties that government agencies may not agree to open-ended indemnification, the other party procures a large insurance policy to cover its risks. If the private party includes in its overall contract price the cost it incurred in obtaining this insurance, the agency may properly pay this cost as part of the contract. See *National Railroad Passenger Corp. v. United States*, 3 Cl. Ct. 516 (1983); 62 Comp. Gen. 361 (1983).

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HERCULES, INC. ET AL. *v.* UNITED STATES
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 94–818. Argued October 30, 1995—Decided March 4, 1996

Petitioner chemical manufacturers produced the defoliant Agent Orange under contracts with the Federal Government during the Vietnam era. After they incurred substantial costs defending, and then settling, tort claims by veterans alleging physical injury from the use of Agent Orange, petitioners filed suits under the Tucker Act to recover such costs from the Government on alternative theories of contractual indemnification and warranty of specifications provided by the Government. The Claims Court granted summary judgment against them and dismissed the complaints. The Court of Appeals consolidated the cases and affirmed.

Held: Petitioners may not recover on their warranty-of-specifications and contractual-indemnification claims. Pp. 422–430.

(a) The Tucker Act's grant of jurisdiction to the Claims Court to hear and determine claims against the Government that are founded upon any "express or implied" contract with the United States, 28 U. S. C. § 1491(a), extends only to contracts either express or implied in fact, not to claims on contracts implied in law, see, *e. g.*, *Sutton v. United States*, 256 U. S. 575, 581. Because the contracts at issue do not contain express warranty or indemnification provisions, petitioners must establish that, based on the circumstances at the time of contracting, there was an implied agreement between the parties to provide the undertakings that petitioners allege. Pp. 422–424.

(b) Neither an implied contractual warranty of specifications nor *United States v. Spearin*, 248 U. S. 132, the seminal case recognizing a cause of action for breach of such a warranty, extends so far as to render the United States responsible for costs incurred in defending and settling the veterans' tort claims. Where, as here, the Government provides specifications directing how a contract is to be performed, it is logical to infer that the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. However, this inference does not support a further inference that would extend the warranty beyond performance to third-party claims against the contractor. Thus, the *Spearin* claims made by petitioners do not extend to postperformance third-party costs as a matter of law. Pp. 424–425.

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(c) Although the Government required petitioner Wm. T. Thompson Co. to produce Agent Orange under authority of the Defense Production Act of 1950 (DPA) and threat of civil and criminal fines, imposed detailed specifications, had superior knowledge of the hazards, and, to a measurable extent, seized Thompson's processing facilities, these conditions do not give rise to an implied-in-fact agreement to indemnify Thompson for losses to third parties. The Anti-Deficiency Act, which bars federal employees from entering into contracts for future payment of money in advance of, or in excess of, an existing appropriation, 31 U. S. C. § 1341, must be viewed as strong evidence that a contracting officer would not have provided, in fact, the contractual indemnification Thompson claims. And, the detailed statutes and regulations that enable such contracting officers to provide indemnity agreements to certain contractors show that implied agreements to indemnify should not be readily inferred. Also contrary to Thompson's argument, the DPA provision specifying that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a[n] . . . order issued pursuant to this Act," 50 U. S. C. App. § 2157, does not reveal an intent to indemnify contractors. Likewise, since Thompson claims a breach of warranty by its customer rather than its seller and supplier, it misplaces its reliance on *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124. Finally, petitioners' equitable appeal to "simple fairness" is considerably weakened by the fact that the injured veterans could not recover from the Government, see *Feres v. United States*, 340 U. S. 135, and, in any event, may not be entertained by this Court, see *United States v. Minnesota Mut. Investment Co.*, 271 U. S. 212, 217-218. Pp. 426-430.

24 F. 3d 188, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 431. STEVENS, J., took no part in the consideration or decision of the case.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *James S. Turner*, *Alan Dumoff*, *Jerold Oshinsky*, *Gregory W. Homer*, *Rhonda D. Orin*, and *Walter S. Rowland*.

Edward C. DuMont argued the cause for the United States. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor Gen-*

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*eral Bender, David S. Fishback, Alfred Mollin, and Michael T. McCaul.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners in this case incurred substantial costs defending, and then settling, third-party tort claims arising out of their performance of Government contracts. In this action under the Tucker Act, they sought to recover these costs from the Government on alternative theories of contractual indemnification or warranty of specifications provided by the Government. We hold that they may not do so.

When the United States had armed forces stationed in Southeast Asia in the 1960's, it asked several chemical manufacturers, including petitioners Hercules Incorporated (Hercules) and Wm. T. Thompson Company (Thompson), to manufacture and sell it a specific phenoxy herbicide, code-named Agent Orange. The Department of Defense wanted to spray the defoliant in high concentrations on tree and plant life in order to both eliminate the enemy's hiding places and destroy its food supplies. From 1964 to 1968, the Government, pursuant to the Defense Production Act of 1950 (DPA), 64 Stat. 798, as amended, 50 U. S. C. App. § 2061 *et seq.* (1988 ed. and Supp. V), entered into a series of fixed-price production contracts with petitioners. The military prescribed the formula and detailed specifications for manufacture. The contracts also instructed the suppliers to mark the drums containing the herbicide with a 3-inch orange band with "[n]o

**Herbert L. Fenster, Ray M. Aragon, and Robin S. Conrad* filed a brief for the Chamber of Commerce of the United States of America as *amicus curiae* urging reversal.

Robert M. Hager filed a brief for the Agent Orange Coordinating Council as *amicus curiae* urging affirmance.

Gershon M. Ratner filed a brief for the National Veterans Legal Services Program as *amicus curiae*.

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further identification as to conten[t].” Lodging 30 (available in clerk’s office case file). Petitioners fully complied.

In the late 1970’s, Vietnam veterans and their families began filing lawsuits against nine manufacturers of Agent Orange, including petitioners. The plaintiffs alleged that the veterans’ exposure to dioxin, a toxic byproduct found in Agent Orange and believed by many to be hazardous, had caused various health problems. The lawsuits were consolidated in the Eastern District of New York and a class action was certified. *In re “Agent Orange” Product Liability Litigation*, 506 F. Supp. 762, 787–792 (1980).

District Judge Pratt awarded petitioners summary judgment on the basis of the Government contractor defense in May 1983. *In re “Agent Orange” Product Liability Litigation*, 565 F. Supp. 1263. Before the judgment was entered, however, the case was transferred to Chief Judge Weinstein, who withdrew Judge Pratt’s opinion, ruled that the viability of the Government contractor defense could not be determined before trial, and reinstated petitioners as defendants. See *In re “Agent Orange” Product Liability Litigation*, 597 F. Supp. 740, 753 (1984).

In May 1984, hours before the start of trial, the parties settled. The defendants agreed to create a \$180 million settlement fund with each manufacturer contributing on a market-share basis. Hercules’ share was \$18,772,568; Thompson’s was \$3,096,597. Petitioners also incurred costs defending these suits exceeding \$9 million combined.¹

¹ Nearly 300 plaintiffs decided to “opt out” of the certified class and to proceed with their claims independent of the class action. After the class action settled, the defendant manufacturers sought and received summary judgment against these plaintiffs. The District Court found that the opt-out plaintiffs failed to present credible evidence of a causal connection between the veterans’ exposure to Agent Orange and their alleged injuries and that the Government contractor defense barred liability. *In re “Agent Orange” Product Liability Litigation*, 611 F. Supp. 1223 (1985). The Court of Appeals for the Second Circuit affirmed, but solely on the basis of the Government contractor defense. *In re “Agent Orange”*

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Petitioners want the United States to reimburse them for the costs of defending and settling this litigation. They attempted to recover first in District Court under tort theories of contribution and noncontractual indemnification. Having failed there,² they each sued the Government in the United States Claims Court, invoking jurisdiction under 28 U. S. C. § 1491, and raising various claims sounding in contract.³ On the Government's motions, the Claims Court granted summary judgment against petitioners and dismissed both complaints. *Hercules, Inc. v. United States*, 25 Cl. Ct. 616 (1992); *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17 (1992).

The two cases were consolidated for appeal and a divided panel of the Court of Appeals for the Federal Circuit affirmed. 24 F. 3d 188 (1994). The court held that petitioners' claim of implied warranty of specifications failed because petitioners could not prove causation between the alleged breach and the damages. The court explained that, had petitioners pursued the class-action litigation to completion, the Government contractor defense would have barred the imposition of tort liability against them. The Government contractor defense, which many courts recognized before the *Agent Orange* settlement, but which this Court did not con-

Product Liability Litigation, 818 F. 2d 187, 189 (1987), cert. denied *sub nom. Krupkin v. Dow Chemical Co.*, 487 U. S. 1234 (1988).

²The District Court dismissed the claims, *In re "Agent Orange" Product Liability Litigation*, *supra*, and the Second Circuit affirmed. The appeals court found first that *Stencel Aero Engineering Corp. v. United States*, 431 U. S. 666 (1977), precluded such recovery and second that "well-established principles of tort law" would not recognize contribution and indemnity where the underlying claims that settled "were without merit." *In re "Agent Orange" Product Liability Litigation*, *supra*, at 207.

³Thompson also raised in its amended complaint a claim under the Takings Clause of the Fifth Amendment, but subsequently abandoned that claim while still in the Claims Court. *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 22, n. 6 (1992).

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sider until afterward, shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government. *Boyle v. United Technologies Corp.*, 487 U. S. 500, 512 (1988). Because the Court of Appeals believed petitioners could have availed themselves of this defense, the court held that, by settling, petitioners voluntarily assumed liability for which the Government was not responsible. It also rejected Thompson's claim of contractual indemnification. Thompson had argued that the Government, pursuant to §707 of the DPA, 50 U. S. C. App. §2157 (1988 ed.), impliedly promised to indemnify Thompson for any liabilities incurred in performing under the DPA. Not persuaded, the court held that §707 did not create indemnification, but only provided a defense to a suit brought against the contractor by a disgruntled customer whose work order the DPA contract displaced. We granted certiorari, 514 U. S. 1049 (1995), and now affirm the judgment below but on different grounds.⁴

We begin by noting the limits of federal jurisdiction. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U. S. 392, 399 (1976), quoting *United States v. Sherwood*, 312 U. S. 584, 586

⁴JUSTICE BREYER's dissent does not distinguish between, or separately address, the warranty-of-specifications and contractual-indemnification claims. The dissent further observes that petitioners "also set forth" a third "much more general fact-based claim." *Post*, at 436. This third claim, we believe, is indistinguishable from the contractual-indemnification claim that Thompson (but not Hercules) has raised, and which we address. To the extent that it differs from a claim for contractual indemnification, we decline to consider it; such a claim was neither presented to the Court of Appeals nor argued in the briefs to this Court.

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(1941). Congress created the Claims Court⁵ to permit “a special and limited class of cases” to proceed against the United States, *Tennessee v. Sneed*, 96 U. S. 69, 75 (1878), and the court “can take cognizance only of those [claims] which by the terms of some act of Congress are committed to it,” *Thurston v. United States*, 232 U. S. 469, 476 (1914); *United States v. Sherwood*, *supra*, at 586–589. The Tucker Act confers upon the court jurisdiction to hear and determine, *inter alia*, claims against the United States founded upon any “express or implied” contract with the United States. 28 U. S. C. § 1491(a).

We have repeatedly held that this jurisdiction extends only to contracts either express or implied in fact, and not to claims on contracts implied in law. *Sutton v. United States*, 256 U. S. 575, 581 (1921); *Merritt v. United States*, 267 U. S. 338, 341 (1925); *United States v. Minnesota Mut. Investment Co.*, 271 U. S. 212, 217 (1926); *United States v. Mitchell*, 463 U. S. 206, 218 (1983). Each material term or contractual obligation, as well as the contract as a whole, is subject to this jurisdictional limitation. See, *e. g.*, *Sutton*, *supra*, at 580–581 (refusing to recognize an implied agreement to pay the fair value of work performed because the term was not “express or implied in fact” in the Government contract for dredging services); *Lopez v. A. C. & S., Inc.*, 858 F. 2d 712, 714–715, 716 (CA Fed. 1988) (a *Spearin* warranty within an asbestos contract must be implied in fact).

The distinction between “implied in fact” and “implied in law,” and the consequent limitation, is well established in

⁵ Under the Federal Courts Improvement Act of 1982, the newly created Claims Court inherited substantially all of the trial court jurisdiction of the Court of Claims. 96 Stat. 25. In 1992, Congress changed the title of the Claims Court and it is now the United States Court of Federal Claims. Federal Courts Administration Act of 1992, 106 Stat. 4506. Because the most recent change went into effect after that court rendered its decision in this case, we shall refer to it as the Claims Court throughout this opinion.

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our cases. An agreement implied in fact is “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *Baltimore & Ohio R. Co. v. United States*, 261 U. S. 592, 597 (1923). See also *Russell v. United States*, 182 U. S. 516, 530 (1901) (“[T]o give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—‘a coming together of minds’”). By contrast, an agreement implied in law is a “fiction of law” where “a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress.” *Baltimore & Ohio R. Co.*, *supra*, at 597.

Petitioners do not contend that their contracts contain express warranty or indemnification provisions. Therefore, for them to prevail, they must establish that, based on the circumstances at the time of contracting, there was an implied agreement between the parties to provide the undertakings that petitioners allege. We consider petitioners’ warranty-of-specifications and contractual-indemnification claims in turn.

The seminal case recognizing a cause of action for breach of contractual warranty of specifications is *United States v. Spearin*, 248 U. S. 132 (1918). In that case, Spearin had contracted to build a dry dock in accordance with the Government’s plans which called for the relocation of a storm sewer. After Spearin had moved the sewer, but before he had completed the dry dock, the sewer broke and caused the site to flood. The United States refused to pay for the damages and annulled the contract. Spearin filed suit to recover the balance due on his work and lost profits. This Court held that “if the contractor is bound to build according to plans and specifications prepared by [the Government], the contractor will not be responsible for the consequences of defects in the plans and specifications.” *Id.*, at 136. From this, petitioners contend the United States is responsible for

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costs incurred in defending and settling the third-party tort claims.

Neither the warranty nor *Spearin* extends that far. When the Government provides specifications directing how a contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. The specifications will not frustrate performance or make it impossible. It is quite logical to infer from the circumstance of one party providing specifications for performance that that party warrants the capability of performance. But this circumstance alone does not support a further inference that would extend the warranty beyond performance to third-party claims against the contractor. In this case, for example, it would be strange to conclude that the United States, understanding the herbicide's military use, actually contemplated a warranty that would extend to sums a manufacturer paid to a third party to settle claims such as are involved in the present action. It seems more likely that the Government would avoid such an obligation, because reimbursement through contract would provide a contractor with what is denied to it through tort law. See *Stencel Aero Engineering Corp. v. United States*, 431 U. S. 666 (1977).⁶

⁶ JUSTICE BREYER asserts, *post*, at 440, that "the majority . . . impl[ies] that a 1960's contracting officer would not have accepted an indemnification provision because of *Stencel Aero Engineering Corp. v. United States*, 431 U. S. 666 (1977)." The case is cited not for such an implication, but to provide added support for our decision not to extend the warranty-of-specification claim beyond performance. Although we decided *Stencel* after the formation of the Agent Orange contracts, we observed in that opinion that the Court of Appeals for the Ninth Circuit in 1964 had adopted the position we would hold in *Stencel*, and that decisions inconsistent with that view began to arise in the Circuits only in 1972. *Stencel*, 431 U. S., at 669, n. 6 (citing *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379, 404 (CA9 1964), and *Barr v. Brezina Constr. Co.*, 464 F. 2d 1141, 1143-1144 (CA10 1972)). Therefore, when the contracts at issue were drafted, *Wiener* at the very least suggested that the Government would not be liable under a tort theory.

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As an alternative basis for recovery, Thompson contends that the context in which the Government compelled it to manufacture Agent Orange constitutes an implied-in-fact agreement by the Government to indemnify for losses to third parties.⁷ The Government required Thompson to produce under authority of the DPA and threat of civil and criminal fines, imposed detailed specifications, had superior knowledge of the hazards, and, to a measurable extent, seized Thompson's processing facilities. Under these conditions, petitioner contends, the contract must be read to include an implied agreement to protect the contractor and indemnify its losses. We cannot agree.

The circumstances surrounding the contracting are only relevant to the extent that they help us deduce what the parties to the contract agreed to in fact. These conditions here do not, we think, give rise to an implied-in-fact indemnity agreement.⁸ There is also reason to think that a con-

⁷Hercules did not plead contractual indemnification in its complaint or raise the claim in the Court of Appeals. Indeed, in the Claims Court, Hercules expressly disavowed having raised any contractual-indemnification claim. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and for Summary Judgment in No. 90-496, p. 55 ("Hercules' claims for relief all are based on breaches of contractual duties; they are not claims that the Government has impliedly or expressly agreed to indemnify Hercules for open-ended liabilities").

⁸JUSTICE BREYER argues that the record before us does not permit us to find, as we do, that the conditions asserted do not support the inference that the contracting parties had a meeting of the minds and in fact agreed that the United States would indemnify. If JUSTICE BREYER is suggesting that the petitioners need further discovery to develop claims alleged in the complaints and not to some unarticulated third claim, see n. 4, *supra*; *post*, at 436), we believe his plea for further discovery must necessarily apply only to Thompson's contractual-indemnification claim; we hold in this case that the *Spearin* claims made by both petitioners do not extend to postperformance third-party costs as a matter of law. See *supra*, at 425. In any event, JUSTICE BREYER fails to explain what facts are needed, or might be developed, which would place a court on remand in a better position than where we sit today. We take all factual allegations

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tracting officer would not agree to the open-ended indemnification alleged here. The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation. 31 U. S. C. §1341.⁹ Ordinarily no federal appropriation covers contractors' payments to third-party tort claimants in these circumstances, and the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner Thompson claims to have implicitly received under the Agent Orange contracts.¹⁰ We view the Anti-Deficiency Act, and the contract-

as true and still find them inadequate. In addition, we are skeptical that any material information regarding these 30-year-old transactions remains undisclosed, yet still discoverable. Hercules, and presumably Thompson, had access to all discovery materials (including thousands of documents and scores of depositions) produced during the *Agent Orange* class-action litigation. See Motion of United States for a Protective Order Staying Discovery in No. 90-496 (Cl. Ct.), pp. 1, 3-4, n. 1.

⁹The Anti-Deficiency Act, 31 U. S. C. §1341, provides:

“(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

“(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

“(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”

¹⁰With one peculiar exception that the Comptroller General expressly sanctioned, “the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary.” *In re Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361, 364-365 (1983). JUSTICE BREYER finds our reliance on the Comptroller General problematic because of a Comptroller General opinion that finds capped indemnity agreements not improper. *Post*, at 437-438. But the Anti-Deficiency Act applies equally to capped indemnification agreements. We do not suggest that all indemnification agreements would violate the Act, cf. *infra*, at 428-429 (citing

Opinion of the Court

ing officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact, the contractual indemnification Thompson claims. In an effort to avoid the Act's reach, Thompson argues that the Anti-Deficiency Act is not applicable to an implied-in-fact indemnity because such an indemnification is "judicially fashioned" and is "not an express contractual provision." Brief for Petitioners 41. However, "[t]he limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made." *Sutton*, 256 U. S., at 580 (opinion of Brandeis, J.).

When Thompson contracted with the United States, statutory mechanisms existed under which a Government contracting officer could provide an indemnity agreement to specified classes of contractors under specified conditions. See, e. g., 50 U. S. C. § 1431 (1988 ed., Supp. V) (permitting the President, whenever he deems it necessary to facilitate national defense, to authorize Government contracting without regard to other provisions of law regulating the making of contracts; in 1958, the President, in Executive Order No. 10789, delegated this authority to the Department of Defense, provided that the contracts were "within the limits of the amounts appropriated and the contract authorization therefor" and "[p]roper records of all actions taken under the authority" were maintained; in 1971, the President amended the Order to specify the conditions under which indemnification could be provided to defense contractors); 10 U. S. C. § 2354 (1956 statute authorizing indemnification provisions in contracts of a military department for research or development); 42 U. S. C. § 2210 (indemnity scheme, first enacted

statutes that expressly provide for the creation of indemnity agreements); the Act bars agreements for which there has been no appropriation. We consider open-ended indemnification in particular because that is the kind of agreement involved in this case.

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in 1957, for liability arising out of a limited class of nuclear incidents, described in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 63–67 (1978)). These statutes, set out in meticulous detail and each supported by a panoply of implementing regulations,¹¹ would be entirely unnecessary if an implied agreement to indemnify could arise from the circumstances of contracting. We will not interpret the DPA contracts so as to render these statutes and regulations superfluous. Cf. *Astoria Federal Sav. & Loan Assn. v. Solimino*, 501 U. S. 104, 112 (1991).¹²

We find unpersuasive Thompson's argument that § 707 of the DPA¹³ reveals Congress' intent to hold harmless manufacturers for any liabilities which flow from compliance with an order issued under the DPA. Thompson reads the provision too broadly. The statute plainly provides immunity, not indemnity. By expressly providing a defense to liability,

¹¹ See, e. g., 48 CFR § 235.070 (1994) (specifying criteria for indemnification clauses in Department of Defense research and development contracts); §§ 252.235–7000 to 252.235–7001 (contract language to be used for indemnification under 10 U. S. C. § 2354); 32 CFR § 7–303.62 (1983) (contract language to be used for indemnification under 50 U. S. C. §§ 1431–1435 (1988 ed. and Supp.V)).

¹² JUSTICE BREYER asserts that, by citing these statutes and regulations, “the majority implies that a contracting officer, in all likelihood, would not have agreed to an implicit promise of indemnity, for doing so would amount to a bypass of” the provisions. *Post*, at 436–437. We view the statutes and regulations, which cover different fields of Government contracting, not as implying what a contracting officer might have done with regard to the Agent Orange contracts, but as showing that a promise to indemnify should not be readily inferred.

¹³ Section 707 provides, in relevant part:

“No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . . notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.” 50 U. S. C. App. § 2157 (1988 ed.).

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Congress does not implicitly agree that, if liability is imposed notwithstanding that defense, the Government will reimburse the unlucky defendant.¹⁴ We think Thompson's reliance on *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), is likewise misplaced; there, in an action between private parties, we held that the stevedore was liable to the shipowner for the amount the latter paid in damages to an injured employee of the former. Here Thompson claims a breach of warranty by its customer, not by its seller and supplier.

Perhaps recognizing the weakness of their legal position, petitioners plead "simple fairness," Tr. of Oral Arg. 3, and ask us to "redress the unmistakable inequities," Brief for Petitioners 40. Fairness, of course, is in many respects a comparative concept, and the fact that the veterans who claimed physical injury from the use of Agent Orange could not recover against the Government, see *Feres v. United States*, 340 U. S. 135 (1950), considerably weakens petitioners' equitable appeal. But in any event we are constrained by our limited jurisdiction and may not entertain claims "based merely on equitable considerations." *United States v. Minnesota Mut. Investment Co.*, 271 U. S., at 217-218.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS took no part in the consideration or decision of this case.

¹⁴The United States urges us to interpret § 707 as only barring liability to customers whose orders are delayed or displaced on account of the priority accorded Government orders under § 101 of the DPA, which authorizes the President to require contractors to give preferential treatment to contracts "necessary or appropriate to promote the national defense." 50 U. S. C. App. § 2071(a)(1) (1988 ed., Supp. V). We need not decide the scope of § 707 in this case because it clearly functions only as an immunity, and provides no hint of a further agreement to indemnify.

3 Cl.Ct. 516, 31 Cont.Cas.Fed. (CCH) P 71,675

United States Claims Court.
 NATIONAL RAILROAD PASSENGER CORPORATION, Plaintiff,
 v.
 The UNITED STATES, Defendant.
 No. 279-82C.
 Oct. 6, 1983.

Railroad operator sought indemnification from government under terms of contract for property and personal injury claims arising out of collision between train and piece of equipment used on construction project. The Claims Court, Nettlesheim, J., held that: (1) reimbursement sought by railroad operator were subject to requirement of contract that such liability or damage be "allocable to" the contract, not "arising out of and during performance of" contract; (2) railroad operator was entitled to indemnification for property and personal injury claims arising out of collision, because such costs met test of being "allocable to" the contract; and (3) indemnification to railroad operator was not precluded by Anti-Deficiency Act.
 Ordered accordingly.

West Headnotes

[1] [KeyCite Notes](#)



[393 United States](#)

[393III Contracts](#)

[393k70 Construction and Operation of Contracts](#)

[393k70\(12\) Conditions](#)

[393k70\(13\) k. Indemnity, Insurance and Liability for Damages. Most Cited Cases](#)

Under terms of contract between railroad operator and Government by which former granted latter construction easement to make improvements on rail system, railroad operator was to be reimbursed for any liability or damage incurred which was "allocable to" the contract, except that indemnification under fourth subsection was subject to additional requirement that liability arise out of and during performance of contract; therefore, where railroad operator was seeking reimbursement for costs of self-insurance under second and third subsections, those costs did not need to have arisen out of and during performance of contract.

[2] [KeyCite Notes](#)



[393 United States](#)

[393III Contracts](#)

[393k70 Construction and Operation of Contracts](#)

[393k70\(12\) Conditions](#)

[393k70\(13\) k. Indemnity, Insurance and Liability for Damages. Most Cited Cases](#)

Under contract between railroad operator and Government by which former granted latter construction easement to make improvements on rail system, and under which railroad was to be reimbursed for any liability or damage it incurred which was "allocable to" the contract, railroad operator was entitled to indemnification for property and personal injury claims arising out of a collision between train and piece of equipment used on construction project, because costs sought to be reimbursed met test of being "allocable to" the contract.



[3] KeyCite Notes

393 United States

393VI Fiscal Matters

393k85 k. Appropriations. Most Cited Cases

Under contract between railroad operator and Government by which former granted latter construction easement to make improvements on rail system, and under which railroad operator was to be reimbursed for any liability or damage incurred which was "allocable to" the contract, Anti-Deficiency Act did not preclude such indemnity by obligating Government in unlimited amounts potentially in excess of amounts appropriated, because complete indemnification of railroad operator for losses within deductibles would not have had such effect, and section of contract solved problem by providing for a fixed appropriation and limiting reimbursements to railroad operator to amount of appropriation. 31 U.S.C.A. § 1341(a).

*517 Christopher M. Klein, Washington, D.C., for plaintiff.
Randall B. Weill, Washington, D.C., with whom was Asst. Atty. Gen. J. Paul McGrath, Washington, D.C., for defendant; Richard W. Krempasky and Paula J. Barton, Federal Railroad Administration, Washington, D.C., of counsel.

OPINION

NETTESHEIM, Judge.

This contract case comes before the court after argument on the parties' cross-motions for summary judgment. The facts are not in dispute.

FACTS

On February 5, 1976, amid mounting concern over the threatened deterioration of rail service in the busy "Northeast Corridor" between Boston, Massachusetts, and Washington, D.C., Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §§ 801-854 (1976 & Supp. V 1981) (the "Act"). The Act transferred the properties of bankrupt railroad companies in the Northeast Corridor to plaintiff National Railroad Passenger Corporation ("Amtrak" or "plaintiff"), a private, for-profit organization directed to be *518 formed by the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501-645 (1976 & Supp. V 1981). At the same time, the Act provided for the physical rehabilitation of the Northeast Corridor rail system by a Northeast Corridor Improvement Project (the "NECIP"), intended to improve the rail bed and station facilities in order to launch a rail service operating at 120 mph in the Corridor. The Secretary of Transportation delegated his responsibility for the implementation of this plan to the Federal Railroad Administration (the "FRA").

Amtrak refused to grant the FRA a construction easement to build the improvements ordered by Congress on its property unless the FRA awarded it a major portion of the construction contract. Amtrak argued that it should do most of the work around the tracks because, as operator of the railroad, it could best coordinate the rail service and construction work so as to maximize the safety of both. Continuation of rail service during construction was necessary, because the Northeast Corridor main line is one of the busiest stretches of railroad in the world. The parties' intentions, undertakings, and expectations were embodied in a 175-page contract (the "Contract"). Section 2.01, stating the purpose of the Contract, accommodated the safety concerns by conferring a "dual role" on Amtrak as construction manager for part of the project and as "systems operator responsible for ... coordination of construction with rail operations." Subsection 2.01(e) explicitly conferred on Amtrak the responsibility of ensuring "safe operations."

Because Congress' annual appropriations to Amtrak were made for the sole purpose of operating a rail passenger service, Amtrak also insisted on being indemnified for any and all claims having any

connection with the NECIP work. The parties eventually agreed in section 8.40 that the FRA would reimburse Amtrak for that portion of the insurance premiums paid under its existing policies which were "allocable to this Contract." Amtrak's existing catastrophic insurance had a limit of \$38 million in excess of a deductible of \$2 million. Amtrak also was insured for up to \$10 million in excess of a \$1-million deductible for damage to rolling stock and for up to \$10,900,000 in excess of a \$100,000 deductible for damage to fixed properties. The FRA also agreed to indemnify Amtrak for certain losses within the deductible amounts, which the Contract called "the costs of self-insurance," and for certain losses in excess of the policy limits. The issue of the kind of risks to be covered by indemnification was debated vigorously and precipitated this lawsuit.

On April 20, 1979, an Amtrak train collided with a piece of NECIP equipment as the result of an error by an Amtrak switch operator. Defendant reimbursed Amtrak in the amount of \$29,000 for settling the claims of employees who were on the NECIP equipment. On December 28, 1981, the contracting officer denied Amtrak's request under section 8.40 for indemnification of the third-party claims and for the damage to Amtrak's property. The final decision recited that reimbursement for "self-insurance" under subsections (c)(ii) and (iii) was subject to "conditions ... detailed in subsection 8.40 (c)(iv)"—that the costs have arisen out of and during performance of the Contract, in addition to being allocable to the Contract. According to the contracting officer, Amtrak's claims did not meet these conditions. Defendant thus denied Amtrak's claims for \$54,923, representing damage to the train, and for \$259,449.45 paid to passengers and Amtrak employees aboard the train in settlement of personal injury claims. Amtrak subsequently paid additional claims of \$95,000 to passengers and Amtrak employees.

DISCUSSION

"A contract must be considered as a whole and interpreted so as to harmonize and give meaning to all of its provisions." *Victory Carriers, Inc. v. United States*, 199 Ct.Cl. 410, 421, 467 F.2d 1334, 1342 (1972); accord, *A & K Plumbing & Mechanical, Inc. v. United States*, 1 Cl.Ct. 716, 721 (1983) (SETO, J.) (citing cases); see *Kolar, Inc. v. United States*, 227 Ct.Cl. 445, 449, 650 F.2d 256, 260 (1981). "Our concern is with reasonableness*519 of interpretation—whether the contract language, carefully read and given its ordinary, everyday meaning and usage—fairly supports the meaning claimed for it." *B.B. Andersen Construction Co., Inc. v. United States*, 1 Cl.Ct. 169, 172 (1983) (WIESE, J.).

Subsection 8.40(c) of the Contract provides in pertinent part:

Amtrak shall be reimbursed by the Government for the portion *allocable to this Contract* of:

- (i) the cost of insurance as required or approved pursuant to the provisions of this Section 8.40;
- (ii) ... the cost of self-insurance pursuant to subsection (a)(iii) of this Section 8.40; the costs of self-insurance, as used in this subsection (c)(ii), shall mean the amounts of liabilities or claims by third persons (including employees of Amtrak) paid directly by Amtrak under the deductible provisions of ... [Amtrak's catastrophic insurance policy]
- (iii) ... the costs of self-insurance pursuant to subsection (a)(iv) of this Section 8.40; the costs of self-insurance, as used in this subsection (c)(iii), shall mean the losses suffered by Amtrak within the deductible amounts provided in, or in excess of the limits of, or excluded from the coverage of ... [Amtrak's rolling stock and fixed properties insurance policies] ...;
- (iv) the cost of claims or liabilities to third persons for loss of a [sic] damage to property (other than property (A) owned, occupied or used by Amtrak ...) or for death or bodily injury, not compensated by insurance or otherwise, *arising out of and during the performance* of this Contract, whether or not caused by the negligence of Amtrak

(Emphasis added).



[1] Amtrak argues that the Contract obligates the FRA to indemnify it for the rejected claims under subsections (c)(ii) and (iii) as costs "allocable to" the Contract. The Government contends that clause (iv) controls with its concededly more stringent standard of "arising out of and during the performance of" the Contract. According to the Government, this language extends indemnity for claims based on acts attributable to Amtrak's performance of the Contract, not Amtrak's performance of activities as a rail operator. The Government specifically contends that an indemnification claim must have originated from the NECIP construction work.

Under the terms of subsection 8.40(c), Amtrak is to be reimbursed for any liability or damage it incurs which is "allocable to" the Contract, except that indemnification under subsection (c)(iv) is subject to the additional requirement that the liability arise out of and during the performance of the Contract. The only kind of liability for which indemnification is so limited is liability to third persons which is in excess of Amtrak's insurance coverage.^{FN1} The cost of damage to Amtrak's own property, completely covered by subsections (c)(i) and (iii), is excluded expressly from subsection (c)(iv). The cost of all claims of third persons below \$40 million is covered by outside insurance, reimbursed under subsection (c)(i), or "self-insurance," reimbursed under subsection (c)(ii). Accordingly, the cost of such claims also is excluded expressly from subsection (c)(iv) by the phrase "not compensated by insurance or otherwise."

FN1. Work package AM-013, which allocates funds to pay costs under section 8.40, apparently creates a third standard for reimbursement of any increase in the insurance premiums paid by Amtrak under its existing insurance policies by undertaking only to pay those additional premiums which are "attributable to Amtrak's participation" in the Contract. Thus, three standards of connectedness between possible damage or liability and the Contract work appear to exist for determining which portion of such costs are reimbursable. For indemnification of costs within the deductibles, the Contract merely requires that such costs be "allocable to" the Contract. An "arising out of and during performance" standard applies to costs in excess of Amtrak's coverage. Initially, defendant was not required to pay anything for the costs attributable to increases in insurance premiums during performance of the Contract, but if such costs increased, defendant was obligated to pay that part of the increase which was attributable to Amtrak's participation in the Contract.

Amtrak is seeking reimbursement for costs of self-insurance under subsections (c)(ii) and (iii), since Amtrak seeks indemnification for liability to third persons (including Amtrak employees) and for damage to its rolling stock amounting to less than \$2 million and \$100,000, respectively-within the deductible amounts of Amtrak's catastrophic and rolling stock insurance policies. To be reimbursable, these costs need only be "allocable to" the Contract. They need not have arisen out of and during the performance of the Contract, as that requirement applies only to claims for indemnification under subsection (c)(iv).^{FN2} No such claim is involved here.

FN2. Had subsection (c)(iv) governed, *Fox Valley Eng'g, Inc. v. United States*, 151 Ct.Cl. 228 (1960) (per curiam), not cited by the parties, provides guidance in construing the critical phrase. In *Fox Valley* the indemnity provision read:

RISK-The Contractor shall assume all risks in connection with the execution of this contract and waive any claim against the Government for damages arising out of the performance of the work specified and shall agree to protect and save harmless the Government from any claims from damages which may result from injuries to property or persons in connection with this work.

Id. at 238. The court adopted the trial commissioner's construction: "The provision was clearly intended to provide immunity to the Government only as to claims by third parties for damages for injuries arising out of plaintiff's performance of the Contract." *Id.* at 239.

Assuming, *arguendo*, that Amtrak's claims arose under subsection (c)(iv), the result would not change. Subsections 2.01(a) and (e) of the Contract, discussed *infra* p. 520, assigned Amtrak as a performance responsibility all work elements involving safety of railroad operations.



[2] The question remains whether the costs sought to be reimbursed meet the test of being "allocable to this Contract." The word "allocable" itself is uninformative absent reference to some other indication of what insurance costs the parties intended to be allocable to the Contract.

Amtrak's affiant John J. Hannigan, the Amtrak representative responsible for negotiating the indemnity provisions, avers that one of the hypothetical accidents for which Amtrak demanded to be indemnified during the negotiations was a possible collision between a passenger train carrying hundreds of passengers and a piece of NECIP equipment. Hannigan Aff., ¶ 8. According to Hannigan, "[t]he FRA representatives acknowledged the need for the indemnity provision to cover the hypothetical accidents which we had cited and discussed, and at no time did the FRA representatives insist that the indemnity provision be limited to accidents exclusively involving or affecting NECIP workers and equipment." *Id.*, ¶ 10. This statement that Amtrak specifically demanded indemnification for a collision between a passenger train and a piece of NECIP equipment and that the FRA agreed that the hypothetical accidents described by Amtrak should be covered remains uncontroverted.

The parties agree that the contract language should be interpreted standing alone and that the affidavits need only be consulted for background facts. Hannigan's statement is corroborated, however, by section 2.01 of the Contract which makes the coordination of rail traffic and construction, so as to avoid collisions, an element of Amtrak's performance under the Contract. Under subsection 2.01(a) Amtrak was to be assigned "all Work Elements that involve continuity or safety of railroad operations." Such work elements were defined in subsection (a)(ii) as ones the performance of which would, *inter alia*, "subject trains to a material risk of derailment or collision as a result of performance of such work." Subsection 2.01(e) further charged Amtrak with responsibility as systems operator "to assure continuity of efficient, safe operations."

Plaintiff takes the position that the function of the switch operator whose error caused the accident fell into the category of work elements defined in subsection 2.01(a)(ii) and that the cost of the resulting claims and damage therefore was allocable to or arose out of the performance of this ***521** work element of the Contract. Defendant counters that Amtrak had a pre-existing duty to ensure the safety of its passengers. Consequently, according to defendant, any agreement to indemnify Amtrak for such claims is void as lacking consideration. The short answer is that the Government, having imposed a contractual obligation on Amtrak to operate its trains safely in the context of the added risks imposed by the NECIP project, cannot be heard later to claim that this consideration was redundant of a pre-existing statutory obligation.

Moreover, Amtrak was under no obligation to grant the FRA an easement on its property to perform work which defendant considered necessary to serve the national interest, but the presence of which increased the risk of train accidents and resulting liability to plaintiff. The fact that such accidents might be caused by the negligence of plaintiff's own employees would not reduce this concern. The presence of the NECIP activity increased Amtrak's exposure to liability for train accidents, as well as the precautions needed to be taken by Amtrak to fulfill its pre-existing duty. For this reason Amtrak refused to grant an easement unless it was awarded the Contract, arguing that it could best coordinate construction and train operation to minimize accidents, while demanding indemnification for any accidents caused by the mere presence of NECIP which, nonetheless, might result.^{FN3}

FN3. Defendant also argues that, in order to be "allocable", a cost must be "assignable or chargeable to one or more cost objectives ... in accordance with the relative benefits received or other equitable relationship," 41 C.F.R. § 1-15.201-4 (1983), whereas in the instant case "[no] benefit, equitable or otherwise, flow[ed] to the Contract from the metroliner's operation." Def's Br. at 34-35. Section 2.01 identifies Amtrak's coordination of rail traffic and construction as a benefit flowing to the Contract, while the increased

risk of accidents imposed on Amtrak by the presence of the construction activity may be said to have given rise to an "equitable relationship" obligating defendant to indemnify Amtrak for collisions between trains and NECIP equipment.



[3] Finally, defendant argues that the Anti-Deficiency Act, 31 U.S.C.A. § 1341(a) (West 1983), precluded an open-ended indemnity in that such an indemnity would have obligated FRA in unlimited amounts potentially in excess of amounts appropriated. Complete indemnification of Amtrak for losses within the deductibles, however, would not have had this effect. Moreover, section 9.01 of the Contract and Work Package AM-013 solved the problem by providing for a fixed appropriation and limiting reimbursements to Amtrak to the amount of the appropriation. The appropriation eventually made (\$2.5 million) was adequate to cover the losses for which Amtrak claims reimbursement in the case at bar. There is no suggestion that the requested reimbursement to Amtrak would cause the amount of this appropriation to be exceeded.

CONCLUSION

Plaintiff's motion for summary judgment is granted, and defendant's is denied. The parties shall file a stipulation as to the amount of judgment by October 28, 1983.

Copr. (C) West 2007 No Claim to Orig. U.S. Govt. Works Cl.Ct.,1983.
National R.R. Passenger Corp. v. U.S.
3 Cl.Ct. 516, 31 Cont.Cas.Fed. (CCH) P 71,675

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ceedings here was either harmless or rendered moot by the Secretary's ratification. I respectfully dissent.



E.I. DU PONT DE NEMOURS AND COMPANY, INC., Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 03-5137.

United States Court of Appeals,
Federal Circuit.

April 28, 2004.

Background: Contractor sued United States under Contract Disputes Act, seeking to recover costs that it incurred pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for ordnance plant that it built and operated for government during World War II. The United States Court of Federal Claims, Lawrence J. Block, J., 54 Fed.Cl. 361, granted summary judgment for government. Contractor appealed.

Holdings: The Court of Appeals, Michel, Circuit Judge, held that:

- (1) indemnification provision in contract for construction and operation of plant obligated government to reimburse contractor for costs it incurred pursuant to CERCLA;
- (2) government's indemnification obligation remained in effect after contract was supplanted by termination supplement;
- (3) Contract Settlement Act (CSA) authorized government's confirmation of broad indemnification commitment made in plant operation contract; and
- (4) CSA provision addressing appropriations did not limit contracting authori-

ty conferred by CSA, so as to deny government authority to make or ratify its indemnification obligation to contractor.

Reversed and remanded.

1. Federal Courts ⇨754.1, 850.1

Court of Appeals reviews without deference conclusions of law of Court of Federal Claims, including those as to interpretation of contracts, and its findings of fact for clear error.

2. Federal Courts ⇨776, 802

Court of Appeals reviews de novo a grant of summary judgment by Court of Federal Claims, drawing all justifiable inferences of fact in favor of the party opposing summary judgment.

3. Environmental Law ⇨447

Indemnification provision in government contract for construction and operation of World War II ordnance plant, in which government agreed to hold contractor harmless against any loss, expense, or damage "of any kind whatsoever" arising from contract work, obligated government to reimburse contractor for costs it incurred pursuant to CERCLA, given absence of contention by government that provision's limiting conditions applied; theory that parties were unable, at the time of contracting, to conceive of CERCLA did not justify reading provision so as to exclude CERCLA costs in light of contract language indicating that indemnification was available for all claims, foreseeable or not. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

4. United States ⇨70(2.1)

The law generally applicable to contracts between private parties also governs

the rights and duties of the United States when it enters into contracts.

5. Environmental Law ⇨447

To the extent that it applied to pre-CERCLA contracts, CERCLA provision relating to indemnification did not bar government's indemnification obligation to government contractor under contract to construct and operate World War II ordnance plant. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(e)(1), 42 U.S.C.A. § 9607(e)(1).

6. Environmental Law ⇨447

Government's obligation to indemnify contractor for liabilities arising out of or in connection with contract to construct and operate World War II ordnance plant, which encompassed contractor's CERCLA-related costs, remained in effect after contract was supplanted by termination supplement, which specifically exempted from release of rights and obligations that it otherwise effected the parties' rights and liabilities under contract provisions applicable to covenants of indemnity. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

7. United States ⇨62

Termination supplement by which government and contractor terminated contract for operation of ordnance plant, including supplement provision that preserved indemnification clause in plant operation contract, enjoyed benefit of any dispensation of Anti-Deficiency Act (ADA) restrictions on open-ended indemnification clauses conferred by Contract Settlement Act (CSA), which was enacted after parties signed termination supplement, even though indemnification commitment being preserved by termination supplement arose before CSA was enacted, in that, by expressly exempting covenants of indemnity from rights and liabilities being released

by termination supplement, government ratified its earlier indemnification promise, as permitted by CSA. 31 U.S.C.A. § 1341; Contract Settlement Act of 1944, §§ 17, 20(a), 41 U.S.C.A. §§ 117, 120(a).

8. United States ⇨74(16)

Contract Settlement Act (CSA) authorized War Department to confirm, in "settlement" represented by termination supplement by which government and contractor terminated contract for operation of World War II ordnance plant, broad indemnification commitment first made by government in plant operation contract. Contract Settlement Act of 1944, § 20(a)(3), 41 U.S.C.A. § 120(a)(3).

9. Environmental Law ⇨447

Pursuant to government's ratification, in termination supplement, of indemnification granted to contractor under contract to operate World War II ordnance plant, which allocated to government all liability incurred by contractor from its operation of plant that did not result from failure of contractor's officers or representatives to exercise good faith or due care, CERCLA liability arising from non-negligent chemical production at plant was "in connection with" parties' termination settlement, and thus came within indemnification authority conferred upon government by Contract Settlement Act (CSA). Contract Settlement Act of 1944, § 20(a)(3), 41 U.S.C.A. § 120(a)(3); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

10. United States ⇨74(16)

Provision of Contract Settlement Act (CSA) addressing appropriations to be used by contracting agency did not limit contracting authority conferred by CSA so as to deny government authority to make or ratify its obligation to indemnify contractor for liability incurred from opera-

tion of World War II ordnance plant that did not result from contractor's lack of good faith or due care. Contract Settlement Act of 1944, §§ 20(a)(3), 22, 41 U.S.C.A. §§ 120(a)(3), 122.

Richard P. Bress, Latham & Watkins, of Washington, DC, argued for plaintiff-appellant. With him on the brief were Maureen E. Mahoney, Latham & Watkins, of Washington, DC; and John McGahren, Latham & Watkins, of Newark, New Jersey.

Kyle E. Chadwick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; and Robert E. Kirschman, Jr., Assistant Director.

Alfred M. Wurglitz, O'Melveny & Myers LLP, of Washington, DC, for amicus curiae American Chemistry Council. With him on the brief were Walter Dellinger and Jonathan D. Hacker.

Before MICHEL, RADER and SCHALL, Circuit Judges.

MICHEL, Circuit Judge.

E.I. DuPont de Nemours & Co., Inc. ("DuPont") instituted this Contract Disputes Act action to recover costs it incurred pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") for an ordnance plant it built and operated for the government during World War II. On the parties' cross-motions for summary judgment, the United States Court of Federal Claims entered judgment for the government. *E.I. Dupont De Nemours & Co. v. United*

States, 54 Fed. Cl. 361 (2002). The trial court correctly held that the government had agreed to indemnify DuPont for the costs at issue. *Id.* at 369. It erred, however, in concluding that a predecessor to the Anti-Deficiency Act, current version at 31 U.S.C. § 1341 (2000), bars DuPont's recovery. *Id.* at 372. Accordingly, we reverse the judgment in favor of the government and remand for a determination of damages and entry of judgment in favor of DuPont.

BACKGROUND

In 1940, the government commissioned DuPont to construct and operate a plant in Morgantown, West Virginia, to produce chemicals for the government's use in producing munitions for World War II. The contract at issue, Contract No. W-ORD-490, entered into on November 28, 1940 (the "MOW¹ Contract"), provided that DuPont would acquire the site for the plant and design, construct, and operate it in exchange for reimbursement of its costs plus a fixed fee. The government would own the plant and all of its production.

The cost reimbursement provision of the MOW Contract ("Reimbursement Clause"²) provided as follows:

1. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual expenditures in the performance of the work under this contract, heretofore or hereafter incurred, as may be approved or ratified by the Contracting Officer and as are included in the following items:

...

k. Losses, expenses, and damages, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting

1. The facility was known as the Morgantown Ordnance Works ("MOW").
2. We adopt the trial court's designations for the contract provisions at issue.

Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer as not having resulted from personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

MOW Contract, Article IV-A(1)(k). The MOW Contract also included the following indemnification provision ("Indemnification Clause"):

8. It is the understanding of the parties hereto, and the intention of this contract, that all work under this Title III is to be performed at the expense of the Government and that the Government shall hold [DuPont] harmless against any loss, expense (including expense of litigation), or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of the work under this Title III, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of [DuPont], or of other representatives of [DuPont] having supervision or direction of the operation of the plant as a whole,

3. According to the trial court, this evidence included: (1) a form to be used for drafting termination supplements for several of DuPont's ordnance contracts, including the contract at issue, which was approved by the DuPont Legal Department and Executive Committee; (2) the termination supplement form contained in the Joint Termination Regulations used by the War and Navy Departments as of November 1, 1944; (3) executed termination supplements for three other DuPont ordnance contracts, including the supplement for one of the contracts (the Gopher

to exercise good faith or that degree of care which they normally exercise in the conduct of [DuPont's] business.

MOW Contract, Article III-A(8).

In 1946, the government terminated the MOW Contract and entered into a supplemental agreement with DuPont (the "Termination Supplement"). Neither DuPont nor the government was able to locate a copy of the Termination Supplement, but the trial court credited DuPont's evidence³ that the Termination Supplement included the following provisions:

(c) Upon payment of said sum of \$ [_____] as aforesaid, all rights and liabilities of the parties under the Contract and under the Act,⁴ insofar as it pertains to the Contract, shall cease and be forever released except:

...

(3) Claims by [DuPont] against the Government which are based upon responsibility of [DuPont] to third parties and which involve costs reimbursable under the contract, but which are not now known to [DuPont].

...

(7) All rights and liabilities of the parties under the contract articles, if any, applicable to options (except options to continue or increase the work under the Contract), covenants not to compete, covenants of indemnity, and agreements with respect to the future care and disposition by [DuPont] of Government-

Ordnance Works contract) mentioned in addition to the MOW Contract in a memo from DuPont's Executive Committee noting approval of the supplement for use in termination settlements; and (4) executed termination supplements of ordnance contracts between the government and three other contractors. *DuPont*, 54 Fed.Cl. at 366.

4. As discussed below, DuPont's appeal is premised on its position that the "Act" referenced here is the Contract Settlement Act of 1944.

owned facilities remaining in his custody.

Termination Supplement, Articles 4(c)(3) (the “Unknown Claims Clause”) & 4(c)(7) (the “Preservation of Indemnity Clause”), respectively. The government does not challenge the trial court’s finding that the Termination Supplement included these provisions.

The United States Environmental Protection Agency (“EPA”) notified DuPont in 1984 that it was proposing to list the MOW site on the National Priorities List for clean-up pursuant to CERCLA.⁵ Ultimately, on April 20, 1990, DuPont (and several other potentially responsible parties)⁶ agreed, pursuant to a consent order with EPA, to conduct a remedial investigation and feasibility study regarding the site. DuPont incurred \$1,322,334.83 in attorney and consulting fees as a result.

After DuPont received no response to the claim it filed pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601–613 (2000), with the Contracting Officer for the Army Corps of Engineers to recover its CERCLA-related costs in 1993, and after its subsequent negotiations with the government failed, DuPont filed the present action.

On cross-motions for summary judgment on the issue of liability, the trial court found, as noted above, that the Termination Supplement included the above-quoted Unknown Claims⁷ and Preserva-

tion of Indemnity Clauses. *DuPont*, 54 Fed. Cl. at 365, 367. It held, further, that both the Indemnification and Reimbursement Clauses in the MOW Contract “were drafted broadly enough to be properly interpreted to place the risk of unknown liabilities on the government, including liability for costs incurred pursuant to CERCLA.” *Id.* at 369. The trial court concluded, nonetheless, that recovery was barred by the Anti-Deficiency Act, 31 U.S.C. § 1341, and its predecessors (“ADA”)⁸, stating:

[T]he Anti-Deficiency Act and its predecessors prohibit the inclusion of open-ended indemnification clauses in government contracts without specific appropriation or statutory authority. Even though the Indemnification Clause was included in this contract and it is quite reasonable to assume that both the contracting officer and the contractor believed this Clause to place the risk of virtually all liabilities on the government rather than the contractor, the state of the law compels us to hold this clause to be void and unenforceable.

DuPont, 54 Fed. Cl. at 370. The court rejected DuPont’s argument that the Act of July 2, 1940, Pub.L. No. 76–703, 54 Stat. 712, specifically, its authorization of the government’s use of cost-plus-fixed-fee contracts,⁹ exempted the MOW Contract from the reach of the ADA. *DuPont*, 54 Fed. Cl. at 373. It did not address, either

5. DuPont was potentially liable by virtue of its operation of the MOW facility. See 42 U.S.C. § 9607(a) (1988).

6. After terminating the Contract with DuPont, the government leased the former MOW site to various other manufacturers.

7. The government conceded that the Termination Supplement included the Unknown Claims Clause. *DuPont*, 54 Fed. Cl. at 365.

8. The Anti-Deficiency Act and its predecessors do not differ in respects material to the

present appeal. Accordingly, except where otherwise noted, we do not distinguish between the statutory versions.

9. In relevant part, the Act of July 2, 1940 provided “[T]he cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.” 54 Stat. at 713.

in granting the government's summary judgment motion or in denying DuPont's motion for reconsideration, DuPont's argument that it is entitled to recovery because another statute, the Contract Settlement Act of 1944, exempted the Termination Supplement from the ADA.

DuPont appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

[1, 2] We review conclusions of law of the Court of Federal Claims, including as to the interpretation of contracts, without deference, and its findings of fact for clear error. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365–66 (Fed.Cir.2003). We review de novo a grant of summary judgment by the Court of Federal Claims, drawing all justifiable inferences of fact in favor of the party opposing summary judgment. *Id.* at 1366 (citing *Winstar Corp. v. United States*, 64 F.3d 1531, 1539 (Fed.Cir. 1995) (en banc)).

I. Contract Interpretation

[3–5] As noted above, the trial court read both the Reimbursement Clause and the Indemnification Clause as obligating the government to reimburse DuPont for the costs it incurred pursuant to CERCLA. Regardless of whether that conclusion was correct as to the Reimbursement Clause, we agree that the Indemnification

Clause is properly construed to include DuPont's CERCLA-related costs.¹⁰

The Indemnification Clause recites the government's express agreement "to hold [DuPont] harmless against *any loss, expense* (including expense of litigation), *or damage* (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) *of any kind whatsoever*" as long as (1) the loss, expense, or damage "aris[es] out of or in connection with the performance of the work under this Title III"—namely, the production of anhydrous ammonia at the MOW facility—and (2):

such loss, expense, damages or liability is [not] due to the personal failure on the part of the corporate officers of [DuPont], or of other representatives of [DuPont] having supervision or direction of the operation of the plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

MOW Contract, Article III–A(8) (emphases added). The indemnity language of this provision ("any . . . expense.. of any kind whatsoever") is clearly sufficiently broad on its face to include DuPont's CERCLA-related liability, and the government does not assert that either of the subsequently recited limiting conditions nullifies any government indemnification obligation.¹¹ Instead, the government

pre-CERCLA contracts) is no bar to enforcement of the government's indemnification obligation to DuPont. The government has not asserted otherwise.

¹⁰ Courts have generally interpreted CERCLA's provision relating to indemnification, 42 U.S.C. § 9607(e)(1) (2000), as not rendering unenforceable indemnification agreements between private parties. See *Interstate Power Co. v. Kan. City Power & Light Co.*, 909 F.Supp. 1241, 1264 (N.D.Iowa 1993) (citing cases from various circuits that have adopted this interpretation). As the law generally applicable to contracts between private parties also governs the rights and duties of the United States when it enters into contracts, *United States v. Winstar Corp.*, 518 U.S. 839, 895, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), we conclude that CERCLA (to the extent it applies to

¹¹ As the trial court observed, "there is no allegation that the events causing [DuPont's] environmental liability occurred as a result of activities conducted at any time other than during the operation of the plant on behalf of the government," and "[t]here has been no allegation or suggestion of bad faith or lack of diligence on the part of [DuPont]." *DuPont*, 54 Fed. Cl. at 369 n. 13, 370.

urges that “contract terms allegedly promising indemnification for costs of complying with environmental laws be strictly construed.” It acknowledges, though, the absence of federal authority for its position in this regard, and further admits that “the rule of strict construction in these circumstances is not universally followed.” In any event, no rule of “construction”—strict or otherwise—can justify interpreting a provision that on its face promises indemnification for “any . . . expense . . . of any kind whatsoever” to exclude DuPont’s CERCLA costs. See *Elf Atochem N. Am. v. United States*, 866 F.Supp. 868, 870 (E.D.Pa.1994) (“In order for a pre-CERCLA indemnification clause to cover CERCLA liability, courts have uniformly held that the clause must be either [1] specific enough to include CERCLA liability or [2] general enough to include any and all environmental liability which would, naturally, include subsequent CERCLA claims.” (quoting *Beazer E., Inc. v. Mead Corp.*, 34 F.3d 206, 210 (3d Cir.1994))). As the court in *Elf Atochem* explained, where the clause in question contains no limiting language, and “shows an intent to allocate all possible liabilities among the parties, . . . ‘CERCLA liability must be included among the future unknown liabilities which the parties allocated between themselves.’” *Id.* at 870–71 (quoting *SmithKline Beecham Corp. v. Rohm Haas Co.*, 854 F.Supp. 1201, 1208 (E.D.Pa.1994), and citing *Olin Corp. v. Consol. Aluminum Corp.*, 807 F.Supp. 1133, 1143 (S.D.N.Y.1992), *aff’d*, 5 F.3d 10 (2d Cir.1993) (concluding that a provision stating that Conalco “releases and settles all claims of any nature which Conalco now has or hereafter could have against Olin” included CERCLA liability)).

Thus we reject the government’s theory that the parties’ inability, as of the time they entered into the MOW Contract or the Termination Supplement, to conceive of CERCLA justifies reading the Indemni-

fication Clause to exclude CERCLA costs. The government identifies no basis in the law for reading a limitation of foreseeability into that provision, the language of which (“any loss, expense . . . or damage . . . of any kind whatsoever”) evidences contemplation of just the opposite—that indemnification was available for all claims, foreseeable or not. Besides, while the parties could not have anticipated the precise contours of CERCLA liability, CERCLA evolved from the doctrine of common law nuisance. See Senate Comm. on Environment Public Works, Environmental Emergency Response Act, S.Rep. No. 96–848, at 14 (1980) (“Another source of legal precedent for strict liability for hazardous substance disposal sites or contaminated areas is nuisance theory.”). Suppose operations at the MOW facility during the 1940–1946 period had resulted in the contamination of the groundwater of nearby parcels, and DuPont had been sued under the extant nuisance law in the years following termination of the MOW Contract by the surrounding landowners for resultant injuries to themselves and their livestock. The government cannot in good faith contend that such claims would have been exempt from reimbursement under the terms of the Indemnification Clause, and it conceded as much at oral argument. Further, we agree with the trial court that the language of the MOW Contract “shows an intent to allocate all possible liabilities among the parties.” *DuPont*, 54 Fed. Cl. at 369 (quoting *Elf Atochem*, 866 F.Supp. at 870). As between DuPont and the government, then, the Indemnification Clause must be read as allocating the burden of the liability in question to the government.

[6] As noted above, the MOW Contract is no longer in effect, having been supplanted by the Termination Supplement the parties executed in 1946. However, the Termination Supplement, which apparently included no termination or expiration

date, specifically exempted “[a]ll rights and liabilities of the parties under the [MOW Contract] articles . . . applicable to . . . covenants of indemnity” from the release of the rights and obligations it otherwise effected. Termination Supplement, Article 4(c)(7). Accordingly, the government’s obligation to indemnify DuPont for liabilities “arising out of or in connection with the performance of the work” it undertook pursuant to the MOW Contract, which we regard as including DuPont’s CERCLA-related costs, remains in effect.

II. The Anti-Deficiency Act

The predecessor to the ADA in effect at the time the parties entered into both the MOW Contract and the Termination Supplement provided, in relevant part:

No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.

31 U.S.C. § 665 (1940) (current version at 31 U.S.C. § 1341). As discussed above, the trial court accepted the government’s argument that the Indemnification Clause, as construed (and, it follows, the Preservation of Indemnity Clause in the Termination Supplement), is unenforceable because it violates the ADA.

The enforceability of what the trial court termed an “open-ended” indemnification clause in the face of the ADA had not previously been decided. The trial court found guidance, however, in decisions interpreting the ADA as a bar to inferring open-ended indemnification clauses in gov-

ernment contracts. *DuPont*, 54 Fed. Cl. at 370–71. For example, in refusing to permit former government contractors to recover the expenses they incurred in defending and settling third-party tort claims arising out of their production of Agent Orange for the governments use in the Vietnam War, the Supreme Court stated:

There is also reason to think that a contracting officer would not agree to the open-ended indemnification alleged here. The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation.

Hercules, Inc. v. United States, 516 U.S. 417, 426, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996). And in *Johns-Manville Corp. v. United States*, 12 Cl.Ct. 1, 33–34 (1987), the United States Claims Court held that the ADA defeated claims for implied indemnification brought by asbestos manufacturers who had paid damages to World War II-era ship-yard workers with asbestos-related diseases. Thus, concluded the trial court in the present case, the ADA also bars the enforcement of express open-ended indemnification clauses.

We do not question the trial court’s reasoning, but we need not further consider its conclusion in this regard. In its appeal, DuPont does not take issue with the trial court’s interpretation or application of the ADA’s apparent general prohibition of open-ended contractual commitments. It relies, instead, on the exception the statute recites: “unless such contract or obligation is authorized by law.” Specifically, contends DuPont, the Contract Settlement Act of 1944 is the “authoriz[ation] by law” that exempts the Preservation of Indemnity Clause (and, therefore, the Indemnification Clause) from the reach of the ADA.¹²

12. DuPont does not challenge the trial court’s conclusion that neither the First War Powers Act, Pub.L. No. 77–354, 55 Stat. 838 (1941),

nor the Act of July 2, 1940, Pub.L. No. 76–703, 54 Stat. 712, provided the requisite authority. The court concluded that to the ex-

III. Contract Settlement Act

The Contract Settlement Act of 1944 (“CSA”), 41 U.S.C. §§ 101 et seq. (2000), expressly declares its “objectives,” which include “assur[ing] to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts.” *Id.* § 101.¹³ According to DuPont, section 20 of the CSA authorized the government contracting agency (then, the War Department) to give the indemnification at issue. In relevant part, that section provides:

Each contracting agency shall have authority, *notwithstanding any provisions of law other than contained in this chapter*, (1) to make any contract necessary and appropriate to carry out the provisions of this chapter; (2) to amend by agreement any existing contract, either before or after notice of its termi-

tion, on such terms and to such extent as it deems necessary and appropriate to carry out the provisions of this chapter; and (3) in settling any termination claim, *to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement.*

ment the First War Powers Act (enacted December 18, 1941) made ADA prohibitions as to open-ended indemnification clauses irrelevant to wartime contracts (i.e., by authorizing the President to permit agencies involved in the war to make “contracts and . . . amendments or modifications of contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts,” 55 Stat. at 839), the President re-imposed those ADA limits in his December 27, 1941 Executive Order limiting the exercise of the First War Powers Act contracting authority he delegated to “the limits of the amounts appropriated therefor. . . .” *DuPont*, 54 Fed. Cl. at 370–71 (citing Executive Order No. 9,001, 6 Fed.Reg. 6787 (Dec. 27, 1941), and *Johns–Marville Corp.*, 12 Cl.Ct. 1). With respect to the Act of July 2, 1940, the trial court rejected DuPont’s argument that the Act’s specific approval of the cost-plus-fixed-fee method of contracting gave the government whatever authority it needed to make an open-ended indemnification commitment. *Id.* at 372.

13. In whole, this provision provides:

The Congress declares that the objectives of this chapter are—

Id. § 120(a) (emphases added).

The government does not dispute that the CSA exempts certain contracts from the operation of the ADA, nor could it, given the bestowal of contracting authority “notwithstanding *any* provisions of law other than contained in this chapter” (emphasis added). As DuPont points out, other similarly worded (in relevant respect) statutes have been construed to confer indemnification authority. See *Hercules*, 116 S.Ct. at 988 (citing 50 U.S.C. § 1431, pursuant to which “[t]he President may

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

41 U.S.C. § 101.

authorize any department or agency . . . to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts"); *Johns-Manville*, 12 Cl.Ct. at 23-24 (acknowledging that the First War Powers Act, Pub.L. No. 77-354, 55 Stat. 838 (1941), which granted the President the power to allow departments or agencies involved in World War II "to enter into contracts and into amendments or modifications of contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts," "can be construed as granting the President the authority to delegate to departments and agencies contracting power virtually unfettered by contract law, including the ADA").¹⁴ The parties differ, however, as to whether the CSA exempted the indemnification provision at issue from the ADA. As noted above, that provision is the Preservation of Indemnity Clause in the Termination Supplement, the latter having terminated the MOW Contract.

[7] Preliminarily, we note that the Termination Supplement was signed by the parties in 1946, two years after the CSA was enacted. Accordingly, the Preservation of Indemnity Clause (and the other provisions of the Termination Supplement) enjoys the benefit of whatever ADA dispensation the CSA conferred. The government did not originate an indemnification commitment in the Termination Supplement. Rather, it agreed to uphold the indemnification commitment it made in the

MOW Contract—before the CSA was enacted. *See* Preservation of Indemnity Clause ("all rights and liabilities of the parties under the [MOW] Contract . . . shall cease and be forever released except . . . [a]ll rights and liabilities of the parties under the contract articles . . . applicable to . . . covenants of indemnity"). The government does not challenge the enforceability of the Preservation of Indemnity Clause on the theory that it merely preserved an indemnification promise made without authority in 1940. However, to the extent the enforceability of the Preservation of Indemnity Clause is subject to question on that ground, we agree with DuPont that, by expressly exempting "covenants of indemnity" from the "rights and liabilities of the parties" released by the Termination Supplement, the government ratified its earlier promise. To conclude otherwise would render illusory the government's agreement to retain those "rights and liabilities" recited in the Preservation of Indemnity Clause. We further agree that the CSA authorized such ratification in stating:

Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission. . . .

41 U.S.C. § 117 (emphases added). Thus, even if the government lacked authority, by virtue of the ADA or otherwise,¹⁵ to

14. DuPont contends that, as compared with 50 U.S.C. § 1431 and the First War Powers Act, the CSA is both "less constrained" (as "it is not subject to the limitations imposed by any other law") and "more express" (because it "specifically authorizes agencies to provide

indemnities against any and all third-party claims").

15. The First War Powers Act, having been enacted in December 1941, could not have authorized an open-ended indemnification clause in a 1940 contract, and we agree that

make the indemnification commitment it made in the 1940 MOW Contract, its express agreement in the 1946 Termination Supplement to maintain its indemnification obligation was authorized to the extent the CSA precludes application of the ADA.

[8] The government notes that the express indemnification authority provided by section 20(a)(3) is limited to the resolution of “termination claims.” Relying, then, on the CSA’s definition of “termination claim” (“any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this chapter authorize to be asserted and settled in connection with any termination settlement,” *id.* § 103(h)), the government argues that its indemnification authority is limited to “provid[ing] suitable compensation for work performed under a terminated contract,” and cites, as an example, “indemnifying the contractor against . . . claims by direct employees or vendors.” The government’s focus on section 20(a)(3) and its acknowledgement that it possessed *some* indemnification authority at the time it signed the Termination Supplement leads us to conclude that it concedes that the War Department was “settling [a] termination claim” (pursuant to section 20(a)(3)) when it made the agreement the Termination Supplement memorializes. The government disputes only the breadth of that authority, contending that the indemnification authority conferred by section 20(a)(3) does not ex-

tend to an indemnification commitment broad enough to encompass DuPont’s CERCLA liability. There are several problems with this position. First, the express authorization that section 20(a)(3) provides for indemnification agreements authorizes indemnification “against . . . any claims by any person in connection with such termination claims or settlement.” *Id.* § 120(a)(3) (emphasis added). This indemnification authority thus cannot be read as limited to claims by a limited class of third parties, for example, employees or vendors of the contractor. And although the authority conferred by section 20(a)(3) is apparently limited to “claims” that are themselves “in connection with . . . termination claims or settlement,”¹⁶ we cannot ignore the phrase “or settlement” at the end of the sentence. The CSA does not define “settlement” or “termination settlement.” However, by distinguishing between “termination claims,” on the one hand, and a “settlement,” on the other, the language of the statute makes clear that Congress intended to provide contracting agencies the flexibility to negotiate concerning two classes of third-party claims that might concern war contractors being terminated. To the extent a contractor came into termination negotiations having already had one or more third-party claims asserted against it, the contracting agency had the authority to “agree to assume” those existing “termination claims.” The language of section 20(a)(3) indicates that Congress was cognizant, however, that contractors

the Act of July 2, 1940 did not provide such authority, having limited the authority of the Secretary of War to enter into cost-plus-fixed-fee contracts to “the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941.” 54 Stat. 712.

16. The statute is not a model of clarity. It may alternatively be read to authorize

“agree[ments] to . . . indemnify[,]” unlimited in scope (i.e., “against . . . any claims by any person”), if those agreements are *made* “in connection with [a] termination claim[] or settlement.” 41 U.S.C. § 120(a)(3). This interpretation, however, is undermined by the language introducing this subsection (a)(3), which itself ties the indemnification authority granted therein to the “sett[lement of] any termination claim.”

undergoing termination would also be concerned about potential future (i.e., unknown, unasserted) third-party claims they might face. Accordingly, Congress gave contracting agencies the power to resolve, as between the government and the contractor, those unknown, unasserted future third-party claims as well, by agreeing to "indemnify the war contractor against . . . any claims by any person in connection with such . . . settlement." Thus we construe section 20(a)(3) as having conferred the authority to deal with both categories of third-party claims and, in particular, to have authorized the War Department to confirm, in the "settlement" represented by the Termination Supplement, the broad indemnification commitment it first made in the MOW Contract.

That this interpretation is appropriate is evident when subsection (3) is read in its statutory context. Section 20(a) begins by dispensing with any limitations on contracting authority found anywhere other than in the CSA. *Id.* § 120. Next, subsections (1) and (2) of section 20(a) are grants of contracting authority separate from and in addition to those found in section 20(a)(3)—i.e., "to make any contract necessary and appropriate to carry out the provisions of this chapter" and "to amend by agreement any existing contract, either before or after notice of its termination, on such terms and to such extent as [the contracting agency] deems necessary and appropriate to carry out the provisions of this chapter," respectively. *Id.* § 120(a)(1), (a)(2).¹⁷ By their own terms,

17. Nowhere, by the way, does the government contend that these provisions are inapplicable or insufficient to support the requisite authority.

18. In its report recommending that the House of Representatives pass the legislation that, with amendments not pertinent hereto, was enacted as the CSA, the House Committee on the Judiciary expressly noted that "[p]resent

these grants are unfettered save for the requirement of fidelity to the purposes of the CSA. The expansive language of section 20, we believe, evinces Congress's resolve to facilitate the termination of war contracts so as to, inter alia, "expedite reconversion from war production to civilian production as war conditions permit; [and] assure to prime contractors . . . speedy and equitable final settlement of claims under terminated war contracts." *Id.* § 101(a), (b).¹⁸

Although we believe the statute definitively provided authority for the ratification of the broad indemnification at issue in this case, we note that the agency responsible for its administration as to the MOW Contract also contemporaneously interpreted the statute to confer the requisite authority. On November 1, 1944, the War Department promulgated a Joint Termination Regulation ("Procurement Regulations Revision No. 42") that included a standardized form settlement agreement for cost-plus-fixed-fee contracts. 10 C.F.R. § 849-983.1 (1945 Supp.). Article 4(c)(7) of that form agreement provides:

Upon payment of said sum of \$. . . . (a). . . . as aforesaid, all rights and liabilities of the parties under the Contract and under the Act shall cease forthwith and be forever released except:

...

(7) All rights and liabilities of the parties under the articles, if any, in the Contract applicable to . . . covenants of indemnity. . . .¹⁹

procedures for the settlement of contracts now being terminated are not adequate" and cited the need "to take care of . . . the authority to make negotiated settlements" as one justification for passage. H.R.Rep. No. 78-1590, at 19 (1944).

19. This provision is substantially the same as the Preservation of Indemnity Clause in the Termination Supplement.

Thus, the War Department interpreted the CSA as authorizing the inclusion, in termination settlement contracts, of the indemnification commitments contained in all of its then-existing war contracts, at least some of which, like DuPont's, were unrestricted. Thus, while we believe the statute addressed the issue of authority for that commitment, we note, alternatively, that the War Department's contemporaneous interpretation of the statute as implying that authority may be entitled to deference. See *Brownlee v. DynCorp*, 349 F.3d 1343, 1354 (Fed.Cir.2003) ("In *Chevron*, the Court held that courts reviewing agency interpretations of statutes must answer two questions: (1) 'whether Congress has directly spoken to the precise question at issue,' and if not, (2) 'whether the agency's answer is based on a permissible construction of the statute.'" (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))). Accordingly, we decline the government's invitation to construe section 20 as insufficient to support the broad indemnity the government ratified in the Termination Supplement.

[9] All that is left to argue, then, is that DuPont's CERCLA liability is not "in connection with" that settlement. But (1) the government does not so contend, and (2) by ratifying the indemnification granted in the MOW Contract, which, as discussed above, allocated all potential liabilities between the government and DuPont, the Termination Supplement concomitantly divided those liabilities. Any liability DuPont incurred, then, that "ar[ose] out of or in connection with" DuPont's production of anhydrous ammonia at the MOW facility and did not result from the failure of DuPont officers or representatives to exercise good faith or due care is "in connection with" the section 20(a)(3) settlement DuPont reached with the government. Contamination at the MOW site that resulted in CERCLA liability clearly is in connec-

tion with non-negligent production at the facility.

[10] The government contends, though, that any indemnification authority conferred by section 20 is limited by the terms of another CSA provision, section 22. The latter provides, in part:

Any contracting agency is authorized—

(a) to use for interim financing, the payment of claims, and for any other purposes authorized in this chapter any funds which have heretofore been appropriated or allocated or which may hereafter be appropriated or allocated to it, or which are or may become available to it, for such purposes or for the purposes of war production or war procurement;

(b) to use any such funds appropriated, allocated, or available to it for expenditures for or in behalf of any other contracting agency for the purposes authorized in this chapter. . . .

41 U.S.C. § 122. Section 20, as noted above, confers contracting authority "notwithstanding any provisions of law other than contained in this chapter," clearly contemplating that heed be paid to provisions *in* the CSA. Accordingly, we agree that section 22 limits the authority conferred by section 20. We do not, however, share the government's expansive view of those limits.

The government, with apparent reference to section 22(b), notes that "for example, in paying a termination claim involving two or more agencies, one agency could use funds appropriated to another agency for one of the enumerated purposes." But section 22(a) makes clear that the government's funding flexibility for CSA purposes was not so limited. That section authorizes a contracting agency to "use for . . . the payment of claims and for any other purposes authorized" in the CSA "any funds which . . . may hereafter be

appropriated or allocated to it, or which are or may become available to it, *for such purposes or for the purposes of war production or war procurement.*" *Id.* § 122(a) (emphasis added). Thus, to the extent appropriations for Contract Settlement Act purposes or "war production or war procurement purposes" continue to "hereafter be appropriated" to the contracting agency—now the Department of Defense ("DOD")—that agency has the authority to "pay[] claims" for CSA purposes and, therefore, to have made the commitment to pay those claims in the first place. The government does not assert that the appropriations legislation governing the period in 1993 in which DuPont filed its claim with the Army Corp of Engineers Contracting Officer omitted appropriations to DOD for contract settlement purposes and "for war production or war procurement purposes." And although the government contends that "war" in section 22(a) means only "World War II," the statute does not so state or indicate. If anything, the phrase "for the purposes of war production or war procurement" belies an intent to limit indemnification authorization to claims paid from funds allocated for the prosecution of World War II, since other provisions of the CSA refer to "the war." *See, e.g., id.* §§ 101(a), 103(a). We conclude, therefore, that section 22 did not limit the contracting authority conferred by section 20 so as to deny the government the authority to make or ratify the indemnification commitment at issue.

CONCLUSION

The CSA authorized the government to include the Preservation of Indemnity Clause in the Termination Supplement it entered into with DuPont in 1946, and that Clause ratified and preserved the broad and indefinitely enduring indemnity the government granted DuPont in 1940—an indemnity broad enough to include Du-

Pont's CERCLA liability. Accordingly, we reverse the judgment of the Court of Federal Claims, and remand for a determination of damages and entry of judgment in DuPont's favor.

REVERSED AND REMANDED.

COSTS

No costs.



**Donald H. RUMSFELD, Secretary
of Defense, Appellant,**

v.

**GENERAL DYNAMICS
CORPORATION,
Appellee.**

No. 03-1209.

United States Court of Appeals,
Federal Circuit.

April 29, 2004.

Background: Government appealed from final decision of the Armed Services Board of Contract Appeals, 2002 WL 1307491, requiring apportionment of legal costs for defending against different claims with different outcomes within single proceeding.

Holding: The Court of Appeals, Michel, Circuit Judge, held that Major Fraud Act did not require or permit apportionment of contractor legal defense costs between government's unsuccessful and successful claims.

Reversed in part.

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DECISION



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

FILE: B-201072

DATE: May 12, 1983

MATTER OF: Assumption by Government of Contractor
Liability to Third Persons - Reconsideration

DIGEST:

1. Public Contract Law Section (PCLS), American Bar Association urges reconsideration of B-201072, May 3, 1982, in which we held that a clause for use in cost reimbursement contracts entitled "Insurance-Liability to Third Persons," appearing in Federal Procurement Regulations § 1-7.204-5, violates the Antideficiency Act, 31 U.S.C. § 1341. PCLS sees no violation on face of clause because agencies are bound to contract in accordance with law and regulations and have adequate accounting controls to prevent such violations. GAO points out that it is impossible to avoid violation if clause is used as written because maximum amount of obligation cannot be determined at time the contract is signed. May 3 decision affirmed.
2. In B-201072, May 3, 1982, GAO recommended modified indemnity clause to avoid violation of Antideficiency Act, 31 U.S.C. § 1341. Modification would limit Government liability to amounts available for obligation at time loss occurs and that nothing should be construed to bind the Congress to appropriate additional funds to make up any deficiency. PCLS says this gives contractor an illusory promise because appropriation could be exhausted at time loss occurs. GAO agrees. Modification could be equally disastrous for agencies if entire balance of appropriation is needed to pay an indemnity. GAO suggests no open-ended indemnities be promised without statutory authority to contract in advance of appropriations.
3. PCLS believes holding in B-201072, May 3, 1982, conflicts with another line of decisions holding that "Insurance-Liability to Third Persons" clause was valid. Decisions cited by PCLS all involved indemnities where maximum liability was determinable and funds could be obligated or administratively reserved to cover it. B-201072, distinguished and affirmed.

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On May 3, 1982, the Comptroller General issued a decision (B-201072) in response to a request from the Department of Health and Human Services (HHS) on the validity of a clause in the Federal Procurement Regulations (FPR) entitled "Insurance-Liability to Third Persons." 1/ The clause is intended for use in cost-reimbursement supply and research and development contracts. It provides virtually complete indemnity to contractors for any liability incurred in the performance of such contracts, in unlimited amounts and without restrictions. We agreed with HHS' assessment that use of the clause in its present form would constitute a violation of the Antideficiency Act, and suggested modified language that would avoid that result. We have now received a letter from the Public Contract Law Section (PCLS) of the American Bar Association, urging reconsideration of that decision. We have carefully considered the arguments presented by the PCLS but are not persuaded that our May 3, 1982 decision was incorrect.

As a general rule, this Office does not render decisions in response to requests from non-governmental entities or from persons not parties to the dispute in question. In this instance, however, we recognize that the PCLS reflects the views of many persons who do business with the Government and who would be directly affected by our decision if all Federal agencies implement it. 2/

1/ The clause reads:

"(c) The contractor shall be reimbursed * * * without regard to and as an exception to the 'Limitation of Cost' or the 'Limitation of Funds' clause of this contract, for liabilities to third persons for loss of or damage to property * * * or for death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the Contractor, his agents, servants, or employees * * *." FPR Section 1-7.204-5.

2/ Our May 3 decision was primarily concerned with the clause found at FPR §§ 1-7.204-5 and 1-7.404-9. However, we noted that the use of the same clause in the same types of contracts is provided for under Defense Acquisition Regulations §§ 7-203.22 and 7-402.26. Therefore, a wide segment of the Government procurement community is affected.

The PCLS urges reconsideration of the May 3 decision "because of the de-stabilizing effect it will have on the time tested allocation of risks between the contractor and the Government." Its principal arguments are summarized as follows:

1. A. The May 3 decision upset a 40-year practice. In 1943, the Comptroller General specifically approved use of this type of clause.
 - B. The May 3 decision conflicts with a long line of opinions relating to the same clause.
 - C. The clause has been used by procurement agencies who were fully aware that it conflicted with other "unrelated" cases.
2. There is no Antideficiency Act violation on the face of the "Insurance-Liability to Third Persons" clause.
3. The modification recommended by GAO is a "naked promise because an appropriation may be exhausted at the time a loss occurs."

These arguments are discussed in the order presented below.

1. A. The present "Insurance-Liability to Third Persons" clause was specifically approved by the Comptroller General in 1943.

The PCLS refers specifically to 22 Comp. Gen. 892 (1943), which it characterizes as holding that the indemnity against liability may be considered a "necessary incident" to the placement of a cost reimbursement contract. It adds:

"The underlying legal doctrine was that the appropriation properly obligated under that contract could by implication be deemed to cover, subject to the amount available therein, the cost of any indemnity and the expenses of completion of the contract work." (Emphasis added.)

In the view of the PCLS, this is directly contrary to our May 3 decision.

We see no such conflict. The 1943 decision responded to a question from the Chairman of the United States Maritime Commission. At that time, the Commission was using contractors to perform trials and tests on the seaworthiness of its vessels. The contractors

were required to take out "public liability" insurance against damages or losses inflicted on third parties. The Commission was reimbursing the contractors for the insurance premiums. The precise question asked was whether the Commission could, in effect "self-insure;" that is, whether it could amend its existing contracts to stop paying insurance premiums and instead agree to indemnify the contractor for any liability to third parties, whether caused by negligence of a contractor's employee or otherwise.

The Comptroller General replied (in paraphrase):

"That's reasonable enough, if you stop paying the insurance premiums, but if you amend your existing contracts to so provide, you cannot agree to pay more in indemnity than the amount presently covered by the existing insurance contracts."

In addition, as the PCLS acknowledges in the portion of its submission previously quoted, any new obligations for indemnification were authorized only "to the extent appropriations are available therefor."

A careful reading of the 1943 decision and the kind of indemnity it sanctioned thus shows two important differences from the "Insurance-Liability to Third Persons" clause at issue. First, the amount of the Government's liability was limited to a precise amount--the amount of liability covered by the contractors' existing public liability insurance,--and second, the amount of the indemnity could not exceed available appropriations. In contrast, the present clause is totally "open-ended;" that is, no maximum liability is either stated or ascertainable by reference to some other document. In addition, no attempt is made to limit Government liability to the amounts available in its appropriation at the time the contract was made or at any other time. In fact, the indemnity obligation is specifically made an exception to the Limitation of Cost or Limitation of Funds clause of the contract which would otherwise be applicable.

- B. The PCLS claims that our May 3 decision conflicts with earlier Comptroller General opinions relating to the same clause. Specifically, it cites (in addition to 22 Comp. Gen. 892, discussed above) 20 Comp. Gen. 632 (1941); 21 Comp. Gen. 149 (1941); and 59 Comp. Gen. 705 (1980).

In both 1941 decisions, the only question involved reimbursement to a contractor for damage to his own property which had been leased by the Government. In the first case, the damage to some heavy equipment was caused by the Government's own negligence; in the second, the damage was attributable to the negligence of the contractor's employees. In neither case was damage to third parties involved. The maximum amount of any potential property damage was therefore readily ascertainable; i.e., even if the equipment was totally destroyed, the maximum liability would be the value of the equipment.

The 1980 decision, 59 Comp. Gen. 705, appears, on first reading, to support the PCLS contention. The Comptroller General did permit the General Services Administration (GSA) to agree to an open-ended and unrestricted indemnity to a public utility providing electric power to a Government agency under the Federal Property and Administrative Services Act. On closer reading, however, it becomes apparent that the Comptroller General carved out a very limited exception to a general rule prohibiting such indemnities.

GSA had been receiving power for many years under general tariff provisions that incorporated the same indemnification provision for all customers of the utility. When GSA was offered a more advantageous individual contract, it sought to drop the indemnity provision, in keeping with previous GAO decisions, including a decision issued only a few months earlier to the Department of State (59 Comp. Gen. 369 (1980)). The public utility insisted on the indemnity and there was no other source from which the Government could obtain the needed utility services. The Comptroller General agreed to permit the indemnity clause, but carefully pointed out that the case was not to serve as a precedent.

This was made very clear a few months later when the Architect of the Capitol sought to use a similar clause in an agreement with the Potomac Electric Power Company to install and test certain equipment designed to monitor the use of electricity for conservation purposes. The Comptroller General refused to follow 59 Comp. Gen. 705 because the Architect's situation did not fall within the "narrow exception created by the GSA decision." B-197583, January 19, 1981. PEPCO, it was pointed out, did not have a monopoly on the services desired.

- C. The PCLS acknowledges that there is a long line of Comptroller General decisions that state:

"Absent specific authority, indemnity provisions in agreements which subject the United States to contingent and undetermined liabilities may contravene the Antideficiency Act."

However, the PCLS terms this line of decisions "unrelated," and in any case, it asserts that until our May 3, 1982 decision was issued, there was "no basis to believe that these two distinct lines of Comptroller General decisions would intersect and clash with each other."

As was previously pointed out, there is no clash that we can discern. Except for the 1980 utility case, discussed above, the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary.

This line of cases stretches back to the days before this Office came into existence. In 15 Comp. Dec. 405 (1909), the Comptroller General's predecessor, the Secretary of the Treasury, wrote a stern reply to the Secretary of Commerce and Labor, who had asked whether his agency could indemnify a railroad against any liability for accidents or injuries arising from the use of "velocipede" cars by Government employees along the railroad tracks. The Secretary of the Treasury said:

"Under the [Antideficiency Act], no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum, that may exceed the appropriation and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency, the consequences of which cannot be defined by the contract."

The line of decisions applying this general principle stretches, unbroken, right up to the May 3 decision at issue. See, for example, 7 Comp. Gen. 507 (1928); 16 Comp. Gen. 803 (1937); 20 Comp. Gen. 95 (1940); A-95749, October 14, 1938; 35 Comp. Gen. 85 (1955); 59 Comp. Gen. 369 (1980); B-197583, January 19, 1981. See also, California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703, 715 (1971).

It should be noted that not all indemnity contracts are proscribed. As pointed out earlier (in discussing the cases that the PCLS thought were in conflict with our May 3 decision), we have never objected to an indemnity where the maximum amount of liability is fixed or readily ascertainable, and where the agency had sufficient funds in its appropriation which could be obligated or administratively reserved to cover the maximum liability. See 42 Comp. Gen. 708 (1963) (overruled in part by 54 Comp. Gen. 824 (1975) with respect to the need to reserve funds); B-114860, December 19, 1979; 48 Comp. Gen. 361 (1968). See also 54 Comp. Gen. 824 (1975), which set forth the rules under which the Government may, in limited circumstances, assume the risk of damage to contractor-owned property used in the performance of its contract with the Government.

Another category of permissible indemnity contracts is those which are protected by a statutory umbrella. The most common example is defense-related contracts which come under 50 U.S.C. § 1431 (often referred to by its Public Law designation, Pub. L. 85-804). There are other statutes that exempt contracts for extra-hazardous activities related to nuclear energy or to the administration of swine flu vaccine. These statutes constitute statutory exceptions to the Antideficiency Act. They confer what might be termed "contract authority" - i.e., authority to commit the Government to future obligations even though no appropriations are available to pay the obligation at the time the contract is made. Such authority was given in each case after full consideration by the Congress of the country's national security or other needs which could not be obtained without permitting this type of indemnity. We have no problem with this principle. It is our view, however, that statutory exceptions should be made by the Congress and not by the executive branch. (See later discussion in response to question 3.)

2. There is no Antideficiency Act violation on the face of the "Insurance-Liability to Third Persons" clause.

The PCLS appears to be quite familiar with the provisions of the Antideficiency Act, subsection (a) of which is now codified at 31 U.S.C. § 1341. It is, therefore, unnecessary to repeat its text here, except to emphasize that the Act prohibits the incurring of any obligation for the future payment of money in advance of or in excess of appropriations adequate to cover it. If the maximum liability is determinable, it is possible

to set aside sufficient funds to meet the obligation if and when it occurs. The clause in question, however, promises an indemnity for property damages, death, or bodily injury. Who can set a maximum price, at the time the indemnity obligation is incurred, on a human life or predict the amount of a court award for serious injury or other dire consequences arising from the performance of a contract? We find that the clause, on its face, commits the Government to pay at some future time an indefinite sum of money should certain events happen. There is no possible way to know at the time the contract is signed whether there are sufficient funds in the appropriation to cover the liability if or when it arises because no one knows in advance how much the liability may be.

The PCLS appears to base its contrary argument on the fact that agency regulations adjure all contracting officers to adhere to "all applicable requirements of law, Executive orders and regulations * * *." According to PCLS, this means:

"Contracting officers have entered into cost-reimbursement type contracts in accordance with applicable provisions of law, as interpreted by, among others, the Comptroller General. Moreover, it would appear Anti-Deficiency Act violations may be barred through the accounting controls established by the procuring agencies for this purpose."

Unfortunately, regulations like accounting controls, are not always followed. Moreover, as explained above, no matter how well intentioned, an agency's contracting and fiscal officers who use the clause as written could not possibly adhere to the requirements of the law or their own accounting controls because they cannot determine the extent of the obligation they are incurring at the time the contract is signed. We therefore affirm our holding in B-201072, May 3, 1982 that the "Insurance-Liability to Third Persons" clause is invalid because, as written, it violates the Antideficiency Act.

3. The modification recommended by GAO is a "naked promise because an appropriation may be exhausted at the time a loss occurs."

GAO recommended in its May 3 decision, among others, that the clause be amended to provide that the indemnity be limited to amounts available in agency appropriations at the time the liability arises, and that nothing in the contract shall be considered to bind the Congress to appropriate additional funds to cover any deficiency. It is the presence of the underlined phrase that disturbs the PCLS.

We agree with the PCLS' observation. A little over a year ago, we issued a decision which illustrates the dilemma well. In B-202518, January 8, 1982, we were asked to approve a payment to the State of New York for injuries to a State militiaman incurred while providing guard services to the Department of the Army for the Winter Olympic Games. Army had included an indemnity clause in the form we recommended (rather than using the "Insurance-Liability to Third Persons" clause permitted by the DAR) in its cost reimbursement support contract with the State of New York. Had the accident happened closer to the end of the fiscal year, it is quite possible that no unobligated balance would have been available to reimburse the State for its Workman's Compensation payments.

If, on the other hand, the accident took place in the beginning of the fiscal year and (let us assume) a large number of militiamen were injured simultaneously, the payment of the indemnity obligations might well wipe out the entire unobligated balance of the appropriation for the rest of the fiscal year. This would certainly frustrate the intent of the Congress, which was to support a winter Olympics program. Whether it would be feasible to rescue the program with supplemental appropriations is problematical, in view of tight budgetary restrictions. At best, the pressures brought to bear on the Congress are precisely the "coercive deficiency" pressures which, as the PCLS describes so aptly, the Antideficiency Act was enacted to eliminate.

To sum up, the solution to the problem recommended in the May 3, 1982 decision, among others, prevents an overt violation of the Antideficiency Act but has potentially disastrous fiscal consequences for the Federal agency involved, and may offer only illusory benefits to the contractor. The PCLS solution, which appears to urge us to endorse the "Insurance-Liability to Third Persons" clause, is not acceptable because it amounts to a prima facie violation of the Antideficiency Act.

We have been informally considering a third approach, which we have shared with the Office of Acquisition Policy, GSA, the Director of the Defense Acquisition Regulatory Council, DOD, and the Director, Office of Federal Procurement Policy, Office of Management and Budget. It is our tentative position that even if contract indemnification clauses are rewritten to meet the minimum requirements of the Antideficiency Act, there should be a clear Government-wide policy restricting their use. Since the potential liability of the Government created by open-ended, indefinite indemnification clauses is so great, we think that any

B-201072

such authority should be viewed as an exception from the basic legislative policy that no Government agency should enter into financial commitments, even though contingent in nature, without an appropriation to cover them. Exceptions to this policy should not be made without express Congressional acquiescence, as has been done in the past whenever the Congress has decided that it was in the best interests of the Government to assume the risks of having to pay off on an indemnity obligation. See, for example, 10 U.S.C. § 2354 (1976); 38 U.S.C. § 4101 (1976); and 42 U.S.C. § 2210 (1976). See also Pub. L. 85-804 and its implementing Executive Order No. 10789, discussed earlier. In other words, our tentative position is that open-ended, indemnification clauses should only be permitted when an agency has been given statutory authority to enter into such an arrangement.

for Milton J. Fowler
Comptroller General
of the United States

ited such intention would have been view of the fact that such payment contravention of the policy of our ruling public officials. There is certainty of law requiring such payment of clerk's estate, and it is equally district or circuit court has no such respect to his office that is transferred to his executors or administrators payment to them of personal commissions (fees) of the office for any death.

re statutes do not revive the office of clerk for the purpose of paying compensation attached to the office to his death; that the death of the to subsequent emoluments of the *compensation is concerned*, operates effectually as though he had been understand that this opinion is in rupted practice of the Auditor's of the statutes upon this subject, ned me that the records of his a deceased clerk claimed or was accrued subsequent to the clerk's

ear that the *expenses* of conduct- after the death of the former tment of a new clerk are proper d emoluments of the office, for ived such expenses would have clerk could have retained as his f the fees collected. It has been al who, under section 789, Re- office upon the death of the ties of the office of marshal in arshal until a new marshal is lary during such continuance ch a case it is clear that the his death, although the office is e deputy's salary is paid.

The proper amount payable as the expenses of the office of clerk of the court is a matter which under a long-continued practice is determined by the Attorney-General, and is allowable only when approved by him, his discretion in such a matter not being ordinarily questioned, and in the present case the office expenses when so approved by the Attorney-General will be allowed out of the fees and emoluments of the office.

For the reasons stated above the decision of the Auditor is approved.

CONTRACT FOR PAYMENT OF DAMAGES TO PRIVATE PROPERTY.

The execution of a contract with a railroad company, which proposes to make the Government liable for any and all damages to the property of said railroad company arising from accident or injury thereto by reason of the use along its railway lines of velocipede cars by government employees, is unauthorized.

Under the act of March 3, 1905, amending section 3679 of the Revised Statutes, no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum that may exceed the appropriation, and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency the consequence of which can not be defined by the contract.

No officer of the Government has a right to bind it by contract for damages resulting from the negligence of its employees.

(Comptroller Tracewell to the Secretary of Commerce and Labor, January 4, 1909.)

I have received your letter of the 19th ultimo as follows:

"The Superintendent of the Coast and Geodetic Survey has referred to the department for consideration a form of agreement, inclosed herewith, which is entered into each season with railroad companies by chiefs and members of leveling parties to secure the privilege of using velocipede cars along railway lines where leveling operations are being conducted. This privilege is regarded as of great value by the bureau, and one that results in a large curtailment of the expense of this work.

"The agreement submitted is one that was entered into by the members of a leveling party for the exercise of this privilege on the San Pedro, Los Angeles and Salt Lake Railroad between Las Vegas, Nev., and Milford, Utah, and was signed by all of the members of the party on March 26, 1908. The consideration that led to the reference of this matter grows out of the presence in the agreement of the following stipulation drafted by the company:

"And the said parties, and each of them, do further hereby agree and undertake to hold and save the railroad company, its successors and assigns, harmless, and indemnify from, and to pay to it any and all loss or damage which may result to its property by reason of any accident or injury to it in any way arising from the use of said velocipede cars or in consequence of the traversing of the said portion of the said railroad for the said purposes, or otherwise."

"It is, of course, quite possible that the use of these velocipede cars might result, directly or indirectly, in an accident which would entail a loss to the company of many thousands of dollars. In his letter of reference Superintendent Tittman calls attention to the fact that the men engaged in this work are not usually men of means, so that the security actually provided by this stipulation in reality amounts to very little. But, as he states, if the agreement were enforced the young men involved would be placed in a very serious situation, inasmuch as the judgment which the company might secure would hang over them for a long time. He therefore suggests, for the purpose of giving the desired security, the plan of substituting for the clause above quoted one which would acknowledge the Government's ownership of these velocipede cars and the application of the general law relating to damages in such cases as might arise.

"The department recognizes the fact that the liability which the individual members of this leveling party have assumed is one for which no compensation is given in return, notwithstanding the large curtailment of expense to the Government in the prosecution of this work. It is therefore thought that this liability should be borne by the Government, if at all. But the department is in doubt as to whether the appropriation 'for field expenses' (35 Stat., 335), out of which the expense of this work is paid, or any other general appropriation of the Coast and Geodetic Survey, is available for the payment of any damages that might result, directly or indirectly, from the use of these velocipede cars. I therefore have the honor to request your decision as to whether an agreement of the character indicated may legally be executed by the department under any existing appropriation. * * *"

is one that was entered into by the party for the exercise of this right in Los Angeles and Salt Lake Railroad and Milford, Utah, and was entered into by the party on March 26, 1908. The reference of this matter to the agreement of the following company:

Each of them, do further hereinafter and save the railroad companies, harmless, and indemnify all loss or damage which may result from any accident or injury to the use of said velocipede cars or any part of the said portion of the tracks, or otherwise.

It is the purpose of the use of these velocipedes or indirectly, in an accident involving the company of many thousands of men, that the men engaged in this work means, so that the security of the application in reality amounts to the fact that the agreement were enforced and be placed in a very serious judgment which the company would not make for them for a long time. The purpose of giving the desired result for the clause above quoted is the Government's ownership and the application of the general principles in such cases as might arise.

It is the fact that the liability of this leveling party have no compensation is given in return, and the payment of expense to the party of this work. It is therefore the cost should be borne by the Government department is in doubt as to whether or not the cost of field expenses' (35 Stat., 335) of this work is paid, or any part of the Coast and Geodetic Survey of any damages that might result from the use of these velocipede cars, nor to request your decision as to the character indicated may be made by the department under any existing

The act of May 27, 1908 (35 Stat., 335), provides:

"For continuing * * * the line of exact levels between the Atlantic, Pacific and Gulf coasts; * * * fifty thousand dollars."

The act of March 3, 1905 (33 Stat., 1257), provides:

"That section thirty-six hundred and seventy-nine of the Revised Statutes is hereby amended to read as follows:

"Sec. 3679. No department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriation unless such contract or obligation is authorized by law. * * * All appropriations made for contingent expenses or other general purposes, except appropriations for the fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year * * *. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month."

The damages that might result from the use of the velocipede cars are necessarily of an uncertain and indefinite nature and such as might cause the appropriation to be exceeded. They might also result from the negligence of the employees of the Government.

Under the act of March 3, 1905, *supra*, no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum that may exceed the appropriation, and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency the consequence of which can not be defined by the contract.

On the other hand, no officer of the Government has a right to bind it by contract for damages resulting from the negligence of its employees. (*Bigby v. United States*, 188 U. S., 400, 409.)

You are therefore advised that you would not be authorized to make the contract indicated.

complete the blanks listed on the viewed as a defect distinguishable covered by the "triviality rule" the case applying this guideline that it concerned a pricing defect any datum contained in the IFB, could not be estimated with any

deliberate exceptions taken to IFB conditions sought to be imposed by force of their bids; however, in the impose any extraneous condition of its bid or to qualify any obligation in the solicitation. So far as its share concerned, the only effect of shipping weight and dimensions or excess transportation charges covered for shipment exceeded such costs, as well as any other bidder, by furnishing figures sufficiently low (assuming the risk of the excess) and since the procuring agency's effect, we do not regard this factor as a condition of the bid.

Considerations in this case are furnished the "triviality" or "de minimis" applied, in that in the latter cases which in some degree affects the referring to the requirements of the whether the nonconformity was so great that there is no question as to the requirements of the specifications, to be paid to it therefor. The question of whether the bid "conforms to the most advantageous to the United States," so as to entitle the bidder under 41 U.S.C. 2305 (c). Since the shipping cost only to the determination of the whether the bid will be the most advantageous we do not believe that the omission of the nonconforming within the meaning of the statute clearly precludes the making

of that determination with certainty. *Cf.* 40 Comp. Gen. 514; 43 *id.* 537. In the present circumstances and on the basis of the administrative determinations of the possible cost of transportation to be borne by the Government there can be no question but that the Cosmos bid is the most advantageous to the Government, and since it is possible to make that determination we do not feel that we would be justified in overruling the contracting officer's waiver of the deficiency, or that a court would consider his action so clearly unauthorized or erroneous as to make the contract void. See *Adelhart Construction Co. v. United States*, 123 Ct. Cl. 456; *Brown & Son Electrical Co. v. United States*, 163 Ct. Cl. 465.

We have not overlooked your further contentions, stated as follows:

(1) The procuring activity contacted Cosmos after bid opening to obtain the shipping information the company omitted from its bid, thereby improperly allowing Cosmos to cure the defect; (2) Cosmos did not intend to conform to the specification contained in Purchase Description ELEX 05114C, quoted above, because of its failure to supply the shipping data; and (3) officials at the procuring activity promised that your company would be afforded an opportunity to lodge a formal protest before award but that an award was consummated without your knowledge.

With respect to the first, the administrative report states that no request was made to Cosmos in this regard until after the agency had made its determination of the maximum transportation costs. In addition, the reply from Cosmos did not furnish any shipping weight or weight of packing and packaging, and therefore did not furnish the omitted information. As to your second contention, we cannot interpret the omission of shipping weight and dimensions as a qualification or exception to the specification requirements of maximum weight and dimensions of the item itself without packaging or packing.

Finally, while it is regrettable that you were not notified in time to submit your protest before award, reportedly by unintentional oversight by the procuring activity, we do not regard that omission as a factor which could affect the legality of the contract awarded.

For the reasons stated your protest must be denied.

[B-164646]

Vehicles—Charter Coach Service—Damage Liability of Government

Assumption by the Selective Service System of liability for damages to motor vehicles by registrants who when ordered for physical examinations or for induction by local boards are transported in Charter Coach Service is not precluded because the System lacks express authority to contract for liability, appropriations for the operation and maintenance of the System providing

authority to contract for the travel of selectees with no express limitation placed on such authority in the appropriation acts or in the Universal Military Training and Service Act. Nor does the fact that the service contracts do not expressly provide for liability preclude the payment of damage claims, the terms of charter certificates furnished when service is used incorporating into the contract by reference the indemnity provision of carriers' charter coach tariffs.

To the Director, Selective Service System, November 26, 1968:

Further reference is made to your letter of June 20, 1968, concerning the question of the liability of the Selective Service System (System) for damages to motor vehicles caused by registrants transported in Charter Coach Service for the System.

You state that it has been a practice of long standing to enter into written agreements with motor carriers or their representatives for the transportation of registrants ordered for physical examination or for induction by Selective Service local boards. Recently claims have been received from motor carriers for compensation for damages to vehicles caused by registrants who have been transported in Charter Coach Service for the System. You request our consideration of the question of the liability of the System for claims of this kind and our decision whether payment should be made for such damages in any otherwise proper case.

The National Military Bus Bureau, representing a number of participating motor carriers, in a letter dated May 10, 1968, copy furnished with your letter, contends that the System is liable for the damages as a "Charter Party" under the provisions of the Charter Coach Tariffs, published pursuant to Federal and State law, and the contract of carriage.

You report that Selectee Passenger Agreement No. 3, the current contract between the System and the National Military Bus Bureau, copy also furnished with your letter, does not contain any specific provision which would make the System liable for damages as a "Charter Party," and further, that the System has not been given any authority by statute to contract for the assumption of liability for damages as a "Charter Party," and express the view that, in the absence of such authority, the System is not liable for those damages.

While, as stated by you, Selectee Passenger Agreement No. 3 does not contain express words declaring that the System agrees to be liable for such damages, it does provide in Part III, paragraph 3, that a Military Charter Coach Certificate, signed by the authorized officer or representative of the System, will be furnished when Charter Coach Service is used. The Charter Certificate thereby forms part of the

tees with no express limitation placed or in the Universal Military Training service contracts do not expressly of damage claims, the terms of charter incorporating into the contract by carriers' charter coach tariffs.

Item, November 26, 1968:

letter of June 20, 1968, concerning Selective Service System (System) and by registrants transported in

of long standing to enter into carriers or their representatives for required for physical examination or medical boards. Recently claims have been made for compensation for damages to vehicles transported in Charter Coach Service request our consideration of the matter for claims of this kind and our recommendations made for such damages in any

1, representing a number of passengers dated May 10, 1968, copy furnished that the System is liable for the damages under the provisions of the Charter Coach Agreement, Federal and State law, and the

Charter Agreement No. 3, the current Charter Agreement of National Military Bus Bureau, does not contain any specific provision which makes the System liable for damages as a result of the assumption of liability for Charter Coach Service. I express the view that, in the absence of a Charter Agreement, the System is not liable for those damages. Charter Coach Agreement No. 3 does not state that the System agrees to be liable for damages. Part III, paragraph 3, that a Charter Coach Agreement signed by the authorized officer is furnished when Charter Coach Service is provided thereby forms part of the

contract of transportation. A provision on the reverse of the Charter Certificate, form NBTA-3 Rev. 5-65 states:

It is understood and agreed that the performance of the service detailed in this certificate is subject to all applicable tariff provisions and such other arrangements as may be agreed upon not contrary to pertinent tariff rules and regulations.

This provision incorporates into the contract by reference the provisions of the carriers' charter coach tariffs. All motor carrier charter coach tariffs to which our attention has been directed contain an indemnity provision reading substantially as follows:

Each vehicle assigned for Charter Service will be in good condition, including the condition of window glass and seats. Any damage to the vehicle caused by the "Charter Party" will be charged by the Carrier to the "Charter Party."

See Rule 10, Southeastern Charter Coach Tariff No. A-436-B, MP-I.C.C. No. 1678; Rule 10, Northeastern Charter Coach Tariff No. A-285-C, MP-I.C.C. 885; Rule 10, Charter Coach Tariff A-290, National Bus Traffic Association, Inc., Agent, MP-I.C.C. 799; and Rule 9, Capital Motor Lines Charter Coach Tariff No. 12. Therefore, assuming the charter certificate referred to above was executed without being altered in any way, the contract between the System and the carriers does obligate the System for any damage to the vehicle, ordinary wear and tear excepted, unless that contract is unauthorized.

The basic statute, now called the Military Selective Service Act of 1967, approved June 24, 1948, ch. 625, 62 Stat. 604 at 618, as amended, 50 U.S.C. App. 451 at 460, creating the System, is silent concerning the transportation of selectees. However, the appropriation acts from the first have provided funds under language reading substantially like this:

Salaries and Expenses: For expenses necessary for the operation and maintenance of the Selective Service System * * *.

See, for example, the Second Deficiency Appropriation Act, 1948, approved June 25, 1948, ch. 658, 62 Stat. 1027, 1035, and the Independent Offices and Department of Housing and Urban Development Appropriation Act, 1968, approved November 3, 1967, Public Law 90-121, 81 Stat. 341, 350. As shown in the hearings on the bill which became the Independent Offices Appropriation Act, 1965, approved August 30, 1964, Public Law 88-507, 78 Stat. 640, 659, the cost of the transportation of selectees is covered under this general fund. See Hearings before the Subcommittee of the Senate Committee on Appropriations on H.R. 11296, 88th Cong., 2d sess., page 616, item 21, and Hearings Before a Subcommittee of the House Committee on Appropriations, 88th Cong., 2d sess., page 1009. From this provision the

authority to contract for the travel of selectees is derived. And we find no express limitation on this authority either in the appropriation acts or in the Universal Military Training and Service Act.

Under similar circumstances the courts have held, in passing on the authority of Government agents to agree by contract to limitations of time on the assertion of claims by the Government, that the authority to contract, in the absence of express limitation, includes authority to agree to the customary provisions. *United States v. Chicago, Rock Island and Pacific Railroad Co.*, 200 F. 2d 263 (1952); *United States v. Seaboard Air Line Ry. Co.*, 22 F. 2d 113 (1927); *Delaware, L. & W. Railroad Co. v. United States*, 123 F. Supp. 579 (1954); *Grace Line v. United States*, 144 F. Supp. 548 (1956), affirmed 255 F. 2d 810 (1958); *United States v. The South Star*, 115 F. Supp. 102 (1953), affirmed 210 F. 2d 44 (1954).

Also, in a case substantially similar to this one, we held, among other things, that authority in a Federal Aviation Agency appropriation act to hire passenger motor vehicles and aircraft included authority to use in the procurement documents an indemnity provision providing for return of the equipment to the owner in the same condition as received, ordinary wear and tear excepted. 42 Comp. Gen. 708 (1963).

Therefore, in the absence of express statutory limitation, and since the amount of the potential liability is of necessity limited to the value of the motor carrier's equipment and is not indefinite or unlimited [*cf.* 7 Comp. Gen. 507 (1928); 16 *id.* 803 (1937)], we conclude that the Director of the System has authority to agree to an indemnity provision like the one quoted above which appears to be a standard provision in all motor carrier charter coach tariffs.

We note, however, that the President is authorized by the basic statute "* * * to prescribe the necessary rules and regulations to carry out the provisions of this title." Section 10(b) (1) of the Universal Military Training and Service Act, 62 Stat. 619, 50 U.S.C. App. 460(b) (1). This authority was delegated to the Director of the System by Executive Order No. 9979, July 22, 1948, 13 Fed. Reg. 4177, as amended. Pursuant to this authority the System has promulgated the Selective Service System Fiscal and Procurement Manual, Part 3, Travel. By a revision to section 3.51 (j) (1), page 3-38, dated October 1, 1967, the manual provides:

* * * Since the Selective Service System has no specific authorization to pay for damage caused by a registrant while performing travel incident to his selective service obligations, any statement in a charter form which requires such a payment shall be deleted from the form prior to its execution.

The obvious purpose of this revision to the regulation is to prevent agreement to be liable for the damages in question. However, the regu-

selectees is derived. And we find either in the appropriation act and Service Act. The courts have held, in passing on the issue by contract to limitations on the Government, that the authority for an express limitation, includes express provisions. *United States v. Child Co.*, 200 F. 2d 263 (1952); *Hy. Co.*, 22 F. 2d 113 (1927); *United States*, 123 F. Supp. 579 (1956), affirmed 123 F. Supp. 548 (1956), affirmed *The South Star*, 115 F. Supp.

In this one, we held, among other things that the Agency appropriation act in question included authority to use an indemnity provision providing for the same condition as received, 44 Comp. Gen. 708 (1963).

The statutory limitation, and since it is necessarily limited to the value of the property, [303 (1937)], we conclude that the Government is not obligated to agree to an indemnity which appears to be a standard coach tariffs.

The act is authorized by the basic statutory rules and regulations to Section 10(b)(1) of the United States Statute, 62 Stat. 619, 50 U.S.C. App. 1010, referred to the Director of the System in 1948, 13 Fed. Reg. 4177, as the System has promulgated the Procurement Manual, Part 3, Section 101.1(1), page 3-38, dated October

There is no specific authorization to pay for the traveling incident to his selection of a charter form which requires such a contract and its execution.

The purpose of the regulation is to prevent a question. However, the regu-

lation is directed to the personnel of the System, not to the carriers, is to our knowledge not published in the Federal Register, and, in fact, directs the performance of an act not possible under the present structure of the transportation contract, since there is no provision in the Charter Certificate which, in so many words, makes the System liable for the damages in question. The express provision is contained in the several carriers' tariffs and is incorporated by general reference into the Charter Certificate.

While the Director of the System has the authority to limit by regulation the authority of the System's contracting officers, we do not believe that the revision to sections 3.51 (j) (1) is effective for that purpose.

The National Military Bus Bureau, in its letter of May 10, 1968, seems to indicate its willingness to examine the indemnity question and to consider making appropriate amendments to the current Selectee Passenger Agreement. Whether such an amendment could be negotiated without providing increases in the charter hire to be paid the carriers or despite such possible increases the best interests of the System and of the United States would thereby be served, appear to be matters for your consideration.

However, assuming the applicable tariff contains an indemnity provision substantially as set out above and that the charter certificate referred to above without alteration in that regard was executed, it is our view that claims from motor carriers for compensation for damages to vehicles caused by registrants who have been transported in Charter Coach Service for the System, in any otherwise proper case, are required to be allowed and paid.

[B-165227]

Joint Ventures—Independent Debt of One Coventurer

Although the general rule is that funds due a joint venture—a form of limited partnership subject generally to the laws of partnership—may not be set off to satisfy the independent prior debt of one of the coventurers, even if the set-off is only against his interest in the partnership claim, the rule is negated when all the parties to the joint venture agree subsequent to contract performance that the joint venturers will pursue and obtain payment from the Government as individuals. Therefore, the amount due under the agreement to the partner indebted to the Government for damages assessed under his defaulted, individual contract with the Government may be set off to partially liquidate that indebtedness, notwithstanding pursuant to accounting procedure, the indebtedness had been written off as uncollectible.

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[B-174839.2]

**Vessels—Charters—Long-Term—Obligational Availability—
Navy Industrial Fund—Anti-Deficiency Act Compliance**

Navy contracts for long-term lease of 13 TAKX prepositioning ships provide for the Navy to indemnify contractors in case of certain contingencies, principally the loss of specified tax benefits. Because the Government's liability under such clauses is determinable in advance or, where not so determinable, may be avoided by separate action by the Navy, General Accounting Office does not consider such provisions to impose an "indefinite or potentially unlimited contingent liability" in violation of the Antideficiency Act. In addition, with the exception of a provision concerning additional tax liability for increased rental payments resulting from Government ordered improvements, such indemnification clauses are authorized as reasonably incidental to the TAKX program.

**To The Honorable Howard M. Metzenbaum, United States
Senate, January 3, 1984:**

You have requested us to respond to a number of questions concerning the Navy's TAKX prepositioning ship chartering program. Most of your questions concern the inclusion of tax indemnification provisions in contracts for TAKX vessels, and, as requested by your staff, this letter will respond only to those questions. Our responses to your questions on other aspects of the TAKX program will be provided separately.

As described in detail below, we have examined indemnification provisions in the TAKX contracts, and conclude, with one exception, that such agreements are authorized as incidental to the provision of transportation services under the program, and do not pose an indefinite or unlimited contingent liability in violation of the Antideficiency Act, 31 U.S. Code 1341(a).

BACKGROUND

The Navy has entered into contracts to charter 13 TAKX prepositioning vessels in support of the Rapid Deployment Force. There are 13 contractors involved, each a specially created subsidiary of three major corporations: General Dynamics Corporation, Waterman Steamship Corporation, and Maersk Lines, Ltd. Briefly summarized, each vessel is to be chartered under a leveraged lease arrangement that operates in the following manner: the Navy, as charterer, contracts with an intermediate lessee to operate the vessel. The intermediate lessee "bareboat" charters the vessel from the owner/lessor and in turn "time" charters the vessel to the Navy. The intermediate lessee (the "contractor") actually enters into two contracts with the Navy for each vessel: an Agreement to Charter and a Time Charter Party. The first contract governs the rights and responsibilities of the parties until the time of vessel delivery. This contract sets the terms of vessel acceptance, as well as calculation of capital hire. The second contract, which becomes effective upon the Navy's acceptance of vessel delivery, sets out the

terms of the charter itself. See our previous discussion of these two contractual arrangements in 62 Comp. Gen. 143 (1983).

The ship chartering program has been structured so that the tax benefits that are ordinarily available to private owners in this kind of leasing transaction are passed on to the Navy in the form of reduced charter hire rates. Both types of TAKX contracts contain provisions under which the Government accepts the risk of a number of contingencies, including the loss of certain tax benefits that the parties have explicitly "assumed" will be available to each contractor under the agreements.

Under Article VII of the Agreement to Charter, capital hire and termination costs are subject to adjustment in order to prevent the equity owners' after-tax economic yield from being adversely affected by modifications in specified "assumptions subject to adjustments." Thus, adjustments can be made for a number of reasons, including changes in cost recovery deductions for income tax purposes, the unavailability of investment tax credits, and changes to the Internal Revenue Code and regulations in effect at the time of the best and final offer (August 11, 1982). Other specified "assumptions subject to adjustment" that do not relate directly to the contractor's tax liability include bond interest rate and amortization schedules, and the debt/equity ratio. By these provisions, the Navy has, in effect, indemnified the other parties to each lease transaction for any losses due to changes in the principal assumptions underlying the transaction. Any resulting adjustments to the capital hire rates must be made on or before the lease commencement date.

Like the Agreement to Charter, the Time Charter Party also contains certain indemnification provisions, principally dealing with tax matters. Under Article 40 of the contract, the Navy has agreed to pay the contractor any amount incurred by any ship-owning partner due to a loss of specified tax benefits, at least to the extent that the contractor is required to reimburse such partner under the bareboat charter between those two parties. The indemnification provision covers losses caused as a result of the charter agreement being treated for Federal income tax purposes as a lease (as opposed to a service contract), as well as for additional tax liability resulting from the Navy's taking any action not required under the contract, or failing to take any action required (for example, Government ordered changes in the vessels). Reimbursement for any "loss" under Article 40 is to be made within 20 days of receipt of a written demand by the contractor (but only after the actual payment of increased tax liability by a partner). The Navy may require the contractor to cause the partner to contest any disallowance of tax benefit by the Internal Revenue Service, provided the Navy agrees to pay the partner's costs and expenses (including attorney's fees) for so doing.

DISCUSSION

Question 1: Under what authority may the Navy enter into the TAKX indemnification agreements?

Answer: The source of authority for an indemnification agreement is generally the same as that for the activity or program implemented by the contract containing the indemnification provision. This authority, however, is subject to two major limitations. First, a Federal agency may not enter into an indemnification agreement that would impose an indefinite or potentially unlimited contingent liability on the Government, unless specifically authorized to do so by law. 35 Comp. Gen. 85, 87 (1955); B-201394, April 23, 1981. Second, even if the potential liability is limited, such agreements are permissible only to the extent that they are reasonably necessary or incident to the execution of the applicable program or activity. 59 Comp. Gen. 369, 373-4 (1980); 54 *id.* 824, 826 (1975); B-201394, April 23, 1981.

The prohibition against entering into indefinite or potentially unlimited indemnification agreements is based upon the Antideficiency Act, 31 U.S.C. § 1341, which prohibits agencies from incurring obligations in excess of available appropriations. See 35 Comp. Gen. 85, 87 (1955). All types of contingent liabilities involve a risk that occurrence of the applicable contingency could result in an obligation in excess of available funds. In the ordinary situation, the risk of potential Antideficiency Act violations may be minimized by the prior administrative reservation or obligation of additional funds to meet the contingency. See B-198161, November 25, 1980. When, however, the contingent liability is of an unlimited or indeterminate nature, the administrative reservation of funds is not an effective protection. The only protection this Office has recognized in such a case is an explicit contractual limitation of liability to funds available at the time of the occurrence of the contingency, coupled with the assurance that nothing in the agreement will be viewed as binding Congress to approve additional funds to cover a possible deficiency. See, e.g., B-202518, January 8, 1982. Recently, however, we have stated our tentative position that open-ended indemnification agreements should not be entered into regardless of the existence of such language of limitation, unless authorized by law. 62 Comp. Gen. 361, 368 (1983).

a. *Prohibition against indefinite or unlimited liability.* As previously stated, both types of TAKX charter agreements contain indemnification provisions. Those under the Agreement to Charter are framed in very broad terms (*i.e.*, "*any* change in the provisions of the [Internal Revenue] Code or the regulations promulgated thereunder * * *") [Italic supplied.] These indemnification provisions, however, only come into play if vessels are accepted for delivery; the clauses are executed through adjustments in the hire rate to be charged under the charter itself.

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This Office has previously held that the Navy's liability under the TAKX Agreement to Charter is limited by its power to terminate the agreement prior to acceptance of vessel delivery. 62 Comp. Gen. 143, 145 (1983). This principle is equally applicable to the Navy's contingent liability under indemnification provisions in the Agreement to Charter: the Navy's contractual right to terminate sets a ceiling on its liability under the Agreement to Charter.¹ Because of this ceiling, we do not consider such indemnification provisions as imposing an unlimited or indeterminate contingent liability, although we agree they are broadly drawn.² Liability in excess of the termination ceiling imposed under Article VII of the Agreement to Charter could be avoided by the Navy, if necessary, through its refusal to accept vessel delivery. Once accepted, however, any additional liability under the adjustment clauses of the Agreement to Charter would be specifically identified and included as part of the Navy's obligation under the Charter Party.

The indemnification provisions included in the TAKX Charter Party contracts are more specific than the cost-adjustment clauses of the Agreement to Charter. First, these provisions, included in Article 40, deal almost exclusively with the tax effects of the TAKX contractual arrangements. Second, maximum contingent liability under Article 40 is, with one exception, calculable upon commencement of the charter. The exception, to be discussed below, deals with tax liability for additional rent paid to shipowners due to Government-ordered improvements or additions to the TAKX vessels.

Under Article 40 of the Charter Party, the Navy has agreed to pay to the contractor any amount that the contractor is required to reimburse any ship-owning partner (under a similar provision included in the bareboat charter between those two parties) for additional tax liability of the partner due to IRS denial of three specified tax benefits. These benefits are:

(1) Accelerated cost recovery system (ACRS) depreciation deductions that would otherwise be taken by the shipowner over a 5-year recovery period, calculated using a basis of Basic Capitalized Costs (specified in the Agreement to Charter), less Amortizable Fees and Expenses (also specified);

(2) Deductions for interest (after commencement of the lease period) on shipowners' debt financing; and

¹The Navy's termination liability under Article XI of the Agreement to Charter would consist of the amount of basic capitalized costs incurred by the shipowner to the date of termination, not to exceed the total amount of basic capitalized costs included in the Agreement to Charter. Basic capitalized costs are set out in detail in Article XI of the contract (i.e., \$192,591,086 for Maersk No. 1, as itemized in the applicable contract), subject to minor adjustments for increased costs due to requirement changes, interim loan interest rates, commitment fees, etc.

²Compare B-201394, April 23, 1981, in which we stated that a broadly drawn indemnification clause would be permissible if limited by a clause restricting the Government's liability to the amount of appropriations available when the contingency occurs.

at the Navy's liability under limited by its power to terminate of vessel delivery. 62 Comp. This equally applicable to the indemnification provisions in the contract right to terminate the Agreement to Charter.¹ Because such indemnification provisions are indeterminate contingent liability drawn.² Liability in excess of Article VII of the Agreement by the Navy, if necessary, delivery. Once accepted, however, the adjustment clauses of the contract are specifically identified and included in the Charter Party. Included in the TAKX Charter are the cost-adjustment clauses and these provisions, included in with the tax effects of the contract, maximum contingent liability exception, calculable upon the exception, to be discussed additional rent paid to shipowner improvements or additions to the

Party, the Navy has agreed to that the contractor is required to under a similar provision in those two parties) for additional to IRS denial of three speci-

1 (ACRS) depreciation deduction of the shipowner over a 5-year period of Basic Capitalized Costs (less Amortizable Fees and

commencement of the lease and

Article XI of the Agreement to Charter that costs incurred by the shipowner to the amount of basic capitalized costs that capitalized costs are set out in detail in the Maersk No. 1, as itemized in the appendix for increased costs due to requirements fees, etc.

we stated that a broadly drawn instrument by a clause restricting the Government's available when the contingency

(3) Investment tax credits, calculated as 10 percent of Basic Capitalized Costs (less Amortizable Fees and Expenses).

The provision would cover loss of any or all of these benefits resulting from IRS treatment of the charter arrangement as a lease.

As described, the Government's liability under the tax indemnification clause of the Charter Party (with the exception to be discussed below) is limited to these three tax benefits. Because the actual value of these benefits will be calculable upon commencement of the charter (and in fact may be estimated in advance with some degree of accuracy), we do not consider indemnification for their loss to constitute an "indefinite or potentially unlimited" contingent liability.

Article 40 of the Charter Party also contains tax indemnification language that is not limited to the three tax benefits described above. The article provides as follows (paragraph designations and non-pertinent language removed for clarity):

If, solely as a result * * * [the Government] taking any action which is not required by the terms of this Charter, * * * any Partner is required by the Internal Revenue Service to include in gross income for Federal income tax purposes during the Charter Period any amount as additional rental as a result of any non-severable improvement or addition to the Vessel made by the Contractor at the request of [the Government], * * * then [the Government] shall reimburse the Contractor * * * the aggregate amount of additional Federal income tax payable by such Partner as a result of such [inclusion], * * * to the extent that the Contractor is required to and does pay such amount to such Partner pursuant to applicable provisions of the Bareboat Charter * * * .

This language would appear to provide that additional rent charged by the contractor due to Government-ordered vessel improvements or additions will be tax free. There would be no financial limitation to this language: the greater the improvement and subsequent rental increase, the larger the amount of tax reimbursement required under the provision.

Although the foregoing language appears to be "indefinite or potentially unlimited," there is one major limitation that protects against the possibility of future Antideficiency Act violations: the contingency is solely in the hands of the Navy. Thus, the Navy may choose to forego or delay ordering vessel improvements or additions until sufficient funding authority is obtained to cover both additional rental and tax reimbursement payments under Article 40. Therefore, we do not consider this language to fall under the prohibition against indefinite or unlimited contingent liabilities. It is our view, however, that the provision of tax-free rental due to Government-ordered additions would be highly questionable on policy grounds, and could not be supported as necessary or incident to the TAKX program. See discussion below.

Finally, as described earlier, paragraph (g) of Article 40 contains a provision requiring the Navy to reimburse the owner of the vessel for any legal expenses and other costs incurred by the owner pursuant to the Navy's demand that the owner contest any adverse

tax rulings by the IRS. This is analogous in our view to an open-ended indemnification provision. As is the case with additional tax liability due to Government-ordered vessel improvements, however, the Navy itself determines whether the owner will incur any such expenses. Consequently, we do not believe this provision violates the general rule prohibiting unlimited contingent liabilities.

b. *Requirement that expenditures be reasonably necessary or incident to the applicable program.* As stated above, expenditures under an indemnification agreement, like any other expenditure, are permissible only to the extent that they are reasonably necessary or incident to the execution of an authorized program or activity. 59 Comp. Gen. 369, *supra*. The determination as to whether an expense is necessary or incident to the object of the applicable funding source is determined on a case-by-case basis. Although GAO generally affords agencies broad discretion in determining whether a specific expenditure is reasonably related to the accomplishment of an authorized purpose, an agency's discretion in such matters is not unlimited. 18 Comp. Gen. 285, 292 (1938). This Office has had occasion both to approve and to disapprove contract indemnification provisions as necessary or incident to the object of the applicable funding source. Compare 42 Comp. Gen. 708, 712 (1963) with B-137976, December 4, 1958.

The TAKX program is funded out of the Navy Industrial Fund, a revolving fund established to provide capital for industrial and commercial-type activities of the Navy. See 10 U.S.C. § 2208(a)(2) (1980). The fund is reimbursed by annual Operations and Maintenance (O&M) funds of the Department of the Navy, and is thus available only for the purposes permissible under that source appropriation, and subject to the source restrictions. See 28 Comp. Gen. 365 (1948).

Assuming without deciding that the TAKX project is itself a proper activity of the Navy Industrial Fund (and thus, indirectly, of annual Navy O&M appropriations),³ the question remains whether indemnification agreements entered into in connection with that program are also "necessary or incident" to the object of the applicable funding source.

Indemnification provisions under the TAKX Agreement to Charter are designed to establish the basis for adjusting cost calculations under the actual charter. Because of the delay between the time that contracts are signed and commencement of the charter period (approximately 2 years), it is, in our view, reasonable to pro-

³ The Navy's position is that the TAKX program is for the provision of transportation services, an authorized activity of both the Navy Industrial Fund and the Navy O&M appropriation. As we stated in 62 Comp. 143, 144 n. 1 (1983), we do not question the use of the Navy Industrial Fund for the purposes of this program, as we approved the use of the fund to finance similar contracts in our decision 51 Comp. Gen. 598 (1972). We are in the process, however, of reexamining the purposes for which industrial funds are used by the military departments. See H.R. Rep. No. 943, 97th Cong., 2d Sess. 48-49 (1982).

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vide for cost adjustments due to foreseeable changes in financing costs, delivery schedules, and even tax liability. These "indemnification" provisions do not provide any windfall to the applicable contractor, but simply ensure that payments under the Charter Party accurately reflect the contractor's actual costs. In addition, it should be noted that many other Federal contracts contain price adjustment clauses, even for additional tax liability. See, e.g., Defense Acquisition Regulation 7-103.10 (providing for contract price adjustment for changes in excise tax liability due to statutory or regulatory changes, or due to adverse revenue rulings). Consequently, we consider such provisions to be reasonably necessary or incidental to the TAKX program, and would not object to payments made under such provisions (by increasing charter hire payments under the Charter Party).

Similarly, it is our view that indemnification provisions in the TAKX Charter Party, with the exception of the provision dealing with tax liability for increased rent due to Government-ordered improvements, may be considered reasonably necessary or incidental to the program. The TAKX contracts were specifically designed to permit TAKX ship owners to take advantage of certain tax benefits, particularly the 10 percent investment tax credit and accelerated depreciation deductions. These anticipated tax benefits are reflected in lower contract costs charged to the Navy. The tax indemnification provisions simply require that the loss of any such benefits would be reflected by increasing charges under the contract. Again, the contractor would not be receiving a windfall since, in effect, the Navy would only be reimbursing the contractor for any additional tax payments to the United States Treasury.⁴ Accordingly, we believe that it was reasonable for the Navy to provide for increased charter payments to compensate the owners for the loss of anticipated tax benefits.

In addition, we believe that the provision requiring the Navy to reimburse the owner for any legal expenses and related costs arising out of the owner's challenges of any adverse tax rulings, while unusual and perhaps subject to some criticism on general policy grounds, is not unreasonable under the circumstances. Not only does the Navy determine whether or not the owner shall mount such a challenge, but the Navy also would be the "sole" beneficiary if the owner's legal challenge proves successful in restoring the lost tax benefits that would otherwise result in increased charter payments by the Navy.

Finally, we previously noted that Article 40 of the TAKX Charter Party apparently provides for reimbursement by the Navy of

⁴ We also note that paragraph (d) of Article 40, in effect, requires the ship-owning partner to pay to the Navy any reductions in Federal income tax resulting from unanticipated tax benefits received during the course of the charter. In our view, this provides additional support for our conclusion that the tax indemnification provisions are reasonable under the circumstances.

any additional tax liability incurred as a result of rent increases due to Government-ordered vessel additions or improvements. Unlike indemnification for loss of investment tax credits or accelerated depreciation deductions, this additional indemnification language, so far as we can discern, does not reflect any contractual benefit to the Navy (such as reduced hire costs). Rather than affording compensation for contractual concessions granted to the Government, reimbursement of additional tax liability in such a case would constitute a windfall to the ship-owning partner. In our view such a payment does not appear to be justified as reasonably necessary or incident to the TAKX program, or any other authorized activity of the Navy Industrial Fund. Consequently, unless the Navy can show that we have misinterpreted the language in question, or can provide a suitable explanation for such a provision, we consider that particular portion of Article 40 to be void as outside the scope of authority of the contracting officer. See 16 Comp. Gen. 803, 804 (1937). Because this language is readily separable, however, we would not consider its invalidity as affecting the legality of the TAKX contracts as a whole. See, e.g., 15 S. Williston, *A Treatise on the Law of Contracts* § 1779 (3d ed. 1961).

Question 2: Does the Navy have authority to indemnify third-party shipowners under the TAKX contracts?

Answer: We do not agree that the Navy, under the TAKX contracts, has indemnified third-party shipowners, although the arrangements may in fact have this effect. Under Article 40 of the Charter Party, the Navy is indemnifying the specific contractor involved in the TAKX charter arrangement. Although the measure of indemnification is the additional tax liability incurred by the vessel owners, the Navy's payment under the clause would be made to contractors, and only to the extent that the contractor is required to and does reimburse the ship-owning partner under the separate agreement between them (bareboat charter). Thus, the Navy's agreement is to indemnify the contractor for any loss it incurs under its separate agreement to reimburse the shipowner.

The fact that a third-party shipowner will be the eventual beneficiary of the Navy's indemnification agreement with the contractor does not, in our view, render that agreement void. Because the contractor's costs (as incurred under the bareboat charter) may vary with the IRS' determination of the shipowner's tax liability, it is reasonable to recognize such potential cost variations under the Charter Party.

Question 3: If indemnification was in fact required, from what source would payment come?

Answer: As indicated above, indemnification under the TAKX Agreement to Charter is effected through adjustments in capital hire, set prior to the date of commencement of the charter. Consequently, any increased charter payments would be paid from the

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Navy Industrial Fund, which is reimbursed through annual O&M appropriations.

Under the indemnification provisions of the Charter Party, payment is to be "not later than 20 days after a written demand therefor from the Contractor," but not prior to actual payment of additional tax by a shipowning partner (or the reduction of any tax refund). The Navy anticipates that the TAKX contractor will obtain a ruling from the IRS on the tax treatment of the TAKX arrangement prior to commencement of the charter. If so, it is likely that indemnification would be made under the Agreement to Charter rather than the Charter Party, and would be reflected as additional rental payment over the course of the lease. To the extent that payment is required under the Charter Party, the Navy Industrial Fund presumably would remain the source of funding. Because, as discussed previously, we have assumed that Fund to be a proper source for acquisition of transportation services under the TAKX program, it would also be a proper source for an expenditure under an indemnification agreement incidental to that program.⁵

Question 4: Has the Navy already become liable under the TAKX contracts for tax law changes made since they were signed?

Answer: To our knowledge no tax law changes, IRS rulings, or regulation changes have yet occurred that would require adjustment to capital hire rates under indemnification provisions of the TAKX Agreement to Charter. Two recently introduced bills would specifically deny accelerated depreciation deductions and investment tax credits under circumstances such as those that exist in the TAKX program, but neither bill has been enacted into law. See H.R. 4170, 98th Cong., 1st Sess. (1983); S. 1564, 98th Cong., 1st Sess. (1983). In addition, at least one of the two bills (H.R. 4170), as reported, has an effective date that would exempt the TAKX program. H.R. 4170, tit. I, § 102(g), 98th Cong., 1st Sess. (1983).

We hope that the foregoing will be of assistance to you.

⁵ As with other contingent liabilities, there is the possibility that, unless appropriate safeguards are taken, the occurrence of the contingency will impose a liability in excess of available funding, thereby violating the Antideficiency Act. This danger is diminished in the case of the Navy Industrial Fund, which has a larger degree of flexibility than other appropriation accounts (for example, through broad transfer authority annually enacted in Defense appropriation bills—see, e.g., section 733 of the Department of Defense Appropriation Act, 1983, included in section 101(c) of Pub. L. No. 97-377, 96 Stat. 1830, 1836 (1982)). In addition, liability under Article 40 of the TAKX Charter Party would likely be spread out over a period of time, as it would be based on additional tax payments made by the shipowner over the course of the lease. Nonetheless, the Navy should examine the need for establishing a reserve in the Navy Industrial Fund to cover any such contingencies.

of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government or the government of the District of Columbia, without a break in service of more than 3 years.

* * * * *

(e) An employee who transfers to a position to which he cannot transfer his sick leave is entitled to a recredit of the untransferred sick leave if he returns to the leave system under which it was earned, without a break in service of more than 3 years.

As to what constitutes a "break in service," our Office has held that it means an actual separation from the Federal service. See 54 Comp. Gen. 669 (1975); and 47 *id.* 308 (1967). The fact that an employee does not accrue leave in a position is not determinative of his entitlement to later recredit of prior accrued sick leave. 31 Comp. Gen. 485 (1952).

Although Congressional employment is not subject to the statutory leave system, such employment is Federal service. See, for example, 5 U.S.C. §§ 2105 and 8331(1). Therefore, we conclude that Congressional employment does not constitute a break in service as contemplated under 5 C.F.R. § 630.502. We have been informally advised by officials at OPM that they concur in this opinion.

Accordingly, since Mr. Gabriel has not undergone a break in service, his sick leave should be recredited by NASA under the provisions of 5 C.F.R. § 630.502(e).

[B-194983]

Public Utilities—Government Use—Damage, Loss, etc. Claims— Government Indemnification

General Services Administration (GSA) may procure power under tariff or contract requiring customer to indemnify utility against liability arising from delivery of power. GSA has authority to procure power for Government under tariffs. Where no other practical source exists, tariff requirement is applied uniformly to purchases, without singling out Government, and risk of loss is remote, GAO will interpose no objection to existing practice of agreeing to tariff, with indemnity requirement, nor to proposed contract with similar indemnity provision. However, GSA should report situation to Congress.

Matter of: Government indemnification of public utilities against loss arising out of sale of power to Government, September 3, 1980:

This decision concerns the propriety of agreement by the General Service Administration (GSA) to certain indemnity provisions in procuring public utility services for Government agencies and establishments pursuant to section 201(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S. Code 481(a).

GSA states in its request for our decision:

Increasingly, the public utilities are attempting to insert an indemnity provision which, among other things, holds the Government liable to protect and save the utility companies harmless and indemnified from injury or damage to persons and property occasioned by the provision of the utility services.

A typical indemnification provision reads as follows:

"Customer assumes all responsibility for the electric power and energy delivered hereunder after it leaves company's lines at the point of delivery, as well

as for the wires, apparatus and appurtenances used in connection therewith where located at or beyond the point of delivery; and Customer hereby agrees to protect and save Company harmless and indemnified from injury or damage to persons and property occasioned by such power and energy or by such wires, apparatus and appurtenances located at and beyond said point of delivery, except where said injury or damage shall be shown to have been occasioned by the negligence of Company or its contractors. Further, Company shall not be responsible for injury or damage to anyone resulting from the acts of the employees of Customer or of Customer's contractors in tampering with or attempting to repair and/or maintain any of Company's lines, wires, apparatus or equipment located on Company's side of the point of delivery; and Customer will protect, save harmless and indemnify Company against all liability, loss, cost, damage and expense, by reason of such injury or damage to such employee or to any other person or persons, resulting from such acts of Customer's employees or contractor."

GSA also points out that:

In many instances, the public utilities will not consent to any contract without an agreement by the Government to indemnify or protect the public utility from liability in case of injury or property damage. * * *

The companies argue that they are required to include liability or indemnity provisions by the tariffs under which they provide utility services. They hold that they cannot legally provide the services without such protection.

With respect to the latter argument, the Supreme Court has ruled several times that such provisions in the rate schedule cannot preclude the Government from negotiating contracts for utility service which would omit the indemnification provision. (See *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958); *Paul v. United States*, 371 U.S. 245 (1963); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963).)

GSA has been for sometime and is now procuring electricity under tariffs which include indemnity provisions of the kind now proposed to be included in contracts. The Acting Administrator is concerned that, since the proposed clause contains no limitation on the maximum liability of the Government, he is precluded by law from entering into contracts with these clauses. He is aware of our long line of decisions which hold that, unless otherwise authorized by law, an indemnity provision in a contract which subjects the United States to a contingent and undetermined amount of liability would violate 31 U.S.C. § 665(a) (the Anti-deficiency Act) and 41 U.S.C. § 11 (the Adequacy of Appropriations Act) since it can never be said that sufficient funds have been appropriated to cover such contingencies. See, for example, 7 Comp. Gen. 507 (1928); 16 *id.* 803 (1937); and 35 *id.* 85 (1955). See also *California-Pacific Utilities Co. v. United States*, 114 Ct. Cl. 703, 715-716 (1971).

In 54 Comp. Gen. 824 (1975), we proposed that a clause be inserted in any contract providing for assumption of risk for contractor-owned property which limits the amount of such risk to appropriations available for indemnity payments at the time a loss arises, with no implication that the Congress will be required to appropriate funds to make up for any deficiency. This solution would be unacceptable

to the utilities, according that they would be personal injury.

As a possible solution proviso to the proposed i

Provided, however, that r for any liability beyond the Claims Act.

The precise effect of thi the Government's liabili the indemnification clau Act (FTCA) to the vic find it unobjectionable. available to indemnify t to the victim, should t utility instead of from th

The problem cannot b an overly technical and this situation. We do n these circumstances. GS the Government and to of goods or services fro monopolies is unique in is no other source for th requirements, such as th generally to all of the s included in the tariff on the Government has the is not being singled out : can it complain that the notice and the opportuni

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to the utilities, according to GSA, because there is no real assurance that they would be protected in the event of a large award for personal injury.

As a possible solution, GSA's letter suggests adding the following proviso to the proposed indemnification clause:

Provided, however, that nothing herein shall bind or obligate the Government for any liability beyond that for which it would be liable under the Federal Tort Claims Act.

The precise effect of this proviso is unclear. If the intent is to restrict the Government's liability to the liability it would incur even without the indemnification clause, *i.e.*, liability under the Federal Tort Claims Act (FTCA) to the victim of the United States' negligence, then we find it unobjectionable. However, the proviso would not make funds available to indemnify the utility for payments which it might make to the victim, should the victim choose to seek recovery from the utility instead of from the United States.

The problem cannot be resolved without new legislation if we adopt an overly technical and literal reading of the Anti-deficiency Act in this situation. We do not think such a reading is appropriate under these circumstances. GSA is authorized to procure utility services for the Government and to do so under utilities' tariffs. The procurement of goods or services from State-regulated utilities which are virtually monopolies is unique in important ways. As a practical matter, there is no other source for the needed goods or services. Moreover, the tariff requirements, such as this indemnification undertaking, are applicable generally to all of the same class of customers of the utility, and are included in the tariff only after administrative proceedings in which the Government has the opportunity to participate. The United States is not being singled out for discriminatory treatment nor, presumably, can it complain that the objectionable provision was imposed without notice and the opportunity for a hearing.

Under the circumstances, we have not objected in the past to the procurement of power by GSA under tariffs containing the indemnity clause and there is no reason to object to the purchase of power under contracts containing essentially the same indemnity clause. As noted already, this has of necessity been the practice in the past. The possibility of liability under the clause is in our judgment remote. In any event, we see little purpose to be served by a rule which prevents the United States from procuring a vital commodity under the same restrictions as other customers are subject to under the tariff if the utility insists that the restrictions are non-negotiable. However, because the possibility exists, however remote, that these agreements could result in future liability in excess of available appropriations, GSA should inform the Congress of the situation.

L-GGM

DECISION

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

FILE: B-197583

DATE: January 19, 1981

MATTER OF: Architect of the Capitol - Indemnification
of Public Utility against loss

DIGEST: Architect of the Capitol may not indemnify Potomac Electric Power Company (PEPCO) for loss or damages resulting from PEPCO's performance of tests on equipment installed in Government buildings or from the use of certain impulse devices owned by PEPCO which could be installed in Government buildings to monitor electricity uses for conservation purposes even though loss or damages do not result from PEPCO's negligence. Indemnity agreement would subject United States to contingent indeterminate amount of liability in contravention of 31 U.S.C. § 665 and 41 U.S.C. § 11. Unlike situations where we have sanctioned use of indemnity agreements, here Government has other means available to provide testing and monitoring desired. Furthermore, it has not previously been accepting testing service or using impulse devices from PEPCO under similar indemnity agreement. B-194983, September 3, 1980, 59 Comp. Gen. _____, distinguished.

The Architect of the Capitol asks whether he may agree to indemnify and hold harmless the Potomac Electric Power Company (PEPCO) for any and all loss, liability, cost, and expense resulting from PEPCO's performance of certain tests on equipment installed in Government buildings or from use of certain impulse devices owned by PEPCO which could be installed in Government buildings to monitor electricity use for conservation purposes.

The Architect has indicated that during the renovation of House Office Building Annex No. 2, his office procured several high voltage transformers for installation in the building and that prior to energization they were required to be inspected and tested.

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PEPCO indicated that while it preferred to perform these tests itself without cost to the Government in order to protect its equipment and other customers, it would permit others to perform the inspection and testing in accordance with guidelines prescribed by it.

When the Architect requested PEPCO to perform the inspection and testing on the transformers, PEPCO stated that it was required by regulation adopted by the District of Columbia Public Service Commission to have a document signed by an authorized official of the Architect's office, which provided as follows:

"In consideration of our so making such tests, you agree, for yourself and your successors and assigns, to hold harmless and indemnify us and our successors and assigns from and against [any] and all loss liability cost and expense on account of any injury or damage to persons or property (other than to our employees or property) that may occur, as a result of any malfunctioning or non-functioning of such equipment, unless it shall be found, on the basis of substantial evidence other than mere evidence that we were making, or had made, such tests, that negligence on our part was the approximate [sic] cause of such injury or damage."

The Architect refused to sign this agreement because of his concern that he would be in violation of the Anti-deficiency Act, 31 U.S.C. § 665(a), since he would be creating an obligation which could potentially be in excess of any available appropriation. Since indemnification was required before PEPCO could do the work, the Architect had the inspections and tests performed by employees of his office with the information being provided to PEPCO for its approval. While other sources were considered to perform the testing, they were rejected because of the substantial costs involved.

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The Architect has indicated that the renovation and construction of buildings is continuing and will include the installation of equipment for which testing will also be necessary. He has also indicated that in the future he would prefer to have the tests performed by PEPCO because of its experience.

Officials of the Architect's office have also informally advised this Office that PEPCO will install impulse devices for purposes of monitoring energy use and conservation only if it is held harmless against any and all losses resulting from use of the devices not resulting from PEPCO's negligence. Production and installation of the device by the employees of the Architect's office is an alternative which would result in substantial additional cost.

This Office has recently considered whether the General Services Administration (GSA) could enter into agreements with electric utilities for the providing of electricity which would indemnify and hold harmless the utilities for any injury or damage to persons and property occasioned by the provision of the utility services. ✓ B-194983, September 3, 1980. The question arises because of the long line of our decisions which hold that, unless otherwise authorized by law, an indemnity provision in a contract which subjects the United States to a contingent and undetermined amount of liability would violate ✓ 31 U.S.C. § 665(a) (the Anti-deficiency Act) and ✓ 41 U.S.C. § 11 (the Adequacy of Appropriations Act) since it can never be said that sufficient funds have been appropriated to cover such contingencies. See, for example, ✓ 9 Comp. Gen. 369 (1980); ✓ 5 id. 85 (1955); ✓ 16 id. 803 (1937); ✓ 7 id. 507 (1928). See also ✓ California-Pacific Utilities Co., v. United States, 194 Ct. Cl. 703, 715-716. In ✓ B-194983, we pointed out that:

"The problem cannot be resolved without new legislation if we adopt an overly technical and literal reading of the Anti-deficiency Act in this situation. We do not think such a reading is appropriate under

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these circumstances. GSA is authorized to procure utility services for the Government and to do so under utilities' tariffs. The procurement of goods or services from State-regulated utilities which are virtually monopolies is unique in important ways. As a practical matter, there is no other source for the needed goods or services. Moreover, the tariff requirements, such as this indemnification undertaking, are applicable generally to all of the same class of customers of the utility, and are included in the tariff only after administrative proceedings in which the Government has the opportunity to participate. The United States is not being singled out for discriminatory treatment nor, presumably, can it complain that the objectionable provision was imposed without notice and the opportunity for a hearing.

"Under the circumstances, we have not objected in the past to the procurement of power by GSA under tariffs containing the indemnity clause and there is no reason to object to the purchase of power under contracts containing essentially the same indemnity clause. As noted already, this has of necessity been the practice in the past. The possibility of liability under the clause is in our judgment remote. In any event, we see little purpose to be served by a rule which prevents the United States from procuring a vital commodity under the same restrictions as other customers are subjected to under the tariff if the utility insists that the restrictions are non-negotiable. However, because the possibility exists, however remote, that these agreements could result in future liability in excess of available appropriations, GSA should inform the Congress of the situation." Government

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indemnification of public utilities against loss arising out of sale of power to Government, X B-194983, September 3, 1980, 59 Comp. Gen. _____.

We note that, as in the GSA situation, the indemnification provision concerning the testing is required by regulations adopted by the local public service commission and we have no information that it is being applied in a discriminatory manner. Also, as in the GSA case, the possibility of loss would seem remote. However, unlike the GSA case, here there is another source for performing the test, that is, the Government employees who in fact have performed the tests in the past. An even more important distinction, though, is that unlike the situation in the GSA case, the Architect has not previously been accepting the testing services or using the impulse device from PEPCO and has therefore not previously agreed to the liability represented by the proposed indemnity agreements. In the GSA case, GSA merely sought to enter a contract accepting the same service and attendant liability, previously secured under a non-negotiable tariff, at a rate more advantageous to the Government. Here, however, the Government has other means available to provide the testing and monitoring desired.

Consequently, the Architect's situation does not fall within the narrow exception created by the GSA decision to the general rule against entering into indemnity agreements subjecting the United States to a contingent and undetermined liability in violation of 31 U.S.C. § 665(a) and 41 U.S.C. § 11. The Architect may not agree to indemnify PEPCO against any loss resulting from the testing of Government-owned equipment installed in Government buildings or from use of certain impulse devices owned by PEPCO but installed in Government buildings to monitor electricity use.

However, this does not mean that the Architect is without recourse to use PEPCO's testing or installation services without indemnifying PEPCO. First, we suggest that he take steps to institute a rule change with the

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District's Public Utility Commission. In his submission, the Architect states:

"* * * Counsel for the District of Columbia Public Service Commission has informed my staff that if my position on this matter is correct [that Federal agencies may not enter into open-ended indemnification agreements], a rule change should be instituted with Commission."

Whether this attempt to change the rule would be successful, we cannot say.

If the attempt is unsuccessful, we suggest that the Architect explore with PEPCO the possibility of substituting a reputable insurance company for the Government in providing the required indemnification for PEPCO for any liability arising by virtue of PEPCO's non-negligent performance of the test or installation of the impulse device. We would not object to payment by the Architect of insurance premiums in a reasonable amount to cover PEPCO's risk of liability. See our decision, Project Stormfury-Australia-Indemnification from Damages, 59 Comp. Gen. 369 (1980). (We assume that the amount of the premiums, added to the costs of PEPCO's performance, will still be less than the expense to the Government if the Architect had to perform the work with his own staff.)

Assuming that the insurance alternative is acceptable, the agreement with PEPCO should make it clear that the Government assumes no financial obligation to anyone, regardless of the amount of liability imposed on PEPCO, beyond the duty to pay the insurance premiums in the agreed upon amount.



For the Comptroller General
of the United States



Comptroller General
of the United States

Washington, D.C. 20548

Decision

AF

Matter of: U.S. Park Police Indemnification Agreement
File: B-242146
Date: August 16, 1991

DIGEST

U.S. Park Police may not include an indemnification clause in mutual assistance memoranda of understanding with state and local police unless liability is limited to available appropriated funds and Congress approves such an arrangement.

DECISION

A Deputy Solicitor at the United States Department of the Interior asks whether the Antideficiency Act prohibits the United States Park Police from including indemnification clauses in mutual assistance memoranda of understanding with local law enforcement agencies. In our opinion these agreements fall within the general rule against indemnities which subject the United States to indefinite or potentially unlimited contingent liabilities. The proposed indemnification clause contravenes the Antideficiency Act and should not be entered into unless authorized by Congress.

BACKGROUND

The Secretary of the Interior is authorized to designate state and local law enforcement personnel as special police in the National Park System, 16 U.S.C. § 1a-6(c)(1) (1988). The Secretary is also authorized to cooperate in enforcing state or local laws within national parks located in those jurisdictions. 16 U.S.C. § 1a-6(c)(2). Accordingly, the Park Police maintain memoranda of understanding with local law enforcement agencies in Virginia and Maryland which provide that upon request of the Park Police, local law enforcement personnel may enter areas of the National Park System to act as special police. The memoranda delineate when and how assistance may be provided.

The memoranda also state that the costs of furnishing services are borne by the agency furnishing services and that no claims for reimbursement shall be made by one jurisdiction against another. However, the memoranda do not presently protect local jurisdictions against claims by third parties injured by police action, although the Deputy Solicitor states that he is "aware of no case where a claim has been made against either the United States or a local law enforcement agency when its

employees assisted the Park Police under a memorandum of understanding." Proposed revisions of the memoranda of understanding invoke Virginia and Maryland laws requiring indemnification clauses in law enforcement reciprocal agreements. The laws are identical, requiring that any reciprocal agreement include indemnification clauses which:

"waive any and all claims against the other parties thereto which may arise out of their activities outside their respective jurisdictions under such agreement; and indemnify and save harmless the other parties for property damage or personal injury which may arise out of the activities of the other parties to such agreement outside their respective jurisdictions under such agreement." (Emphasis added.)

Va. Code Ann. § 15.1-131 (1989); Md. Crim. Law Code Ann. Art. 27, § 602B(d) (1987).

The submission states that the Maryland and Virginia jurisdictions will not execute any reciprocal aid agreement without such indemnification clauses and that these jurisdictions seek to include the clauses in any future proposed memoranda of understanding with the Park Police. The Deputy Solicitor notes that state and local law enforcement officers serving as special federal officers under memoranda of understanding with the Park Police are federal employees for purposes of the Federal Tort Claims Act and the Federal Employees Compensation Act. See 16 U.S.C. § 1a-6(d).^X However, the submission notes that this protection is apparently insufficient to meet the statutory requirements of Maryland and Virginia. While protecting the individual police officers, 16 U.S.C. § 1a-6(d)^X "may not provide complete protection for the two states," and local and state governments would remain subject to liability.

OPINION

This Office has long held that absent specific statutory authority, indemnity provisions which subject the United States to indefinite or potentially unlimited contingent liability contravene the Antideficiency Act, 31 U.S.C. § 1341(a).^X (1988), since it can never be said that sufficient funds have been appropriated to cover the contingency.^{1/}

^{1/} See 62 Comp. Gen. 361, 364-365 (1983) and cases cited therein. The Antideficiency Act proscribes expenditures or obligations beyond available appropriations, and prohibits "a contract or obligation for the payment of money before an

(continued...)

Here, the potential liability of the Park Police is unknown because the clause in question provides an indemnity for property damage and personal injury. There is no possible way to know at the time the memoranda are signed whether there are sufficient funds in the appropriation to cover a liability if or when it arises under the indemnification clause because no one knows in advance how much the liability may be.

Although a clause limiting the government's liability to appropriations available at the time a loss arises, with no implication that Congress will be required to appropriate funds to make up any deficiency, would prevent an overt Antideficiency Act violation, we have viewed such a provision in the past as less than ideal because it may have potentially disastrous fiscal consequences for the agency.^{2/} See 62 Comp. Gen. at 366-367. Payment of an especially large indemnity obligation could wipe out the entire unobligated balance of the agency's appropriation for the rest of the fiscal year, forcing the agency to seek a supplemental appropriation. 62 Comp. Gen. at 367, citing B-202518, Jan. 8, 1982. Conversely, if a liability arises toward the end of the fiscal year it is quite possible that no unobligated balance would be available for an indemnity payment.

Our current view is that open-ended indemnification agreements should not be entered into regardless of the existence of language of limitation except with express congressional acquiescence. 63 Comp. Gen. 145, 147 (1984), citing 62 Comp. Gen. at 368. Thus we recommend that the Park Police obtain congressional approval for this type of arrangement.

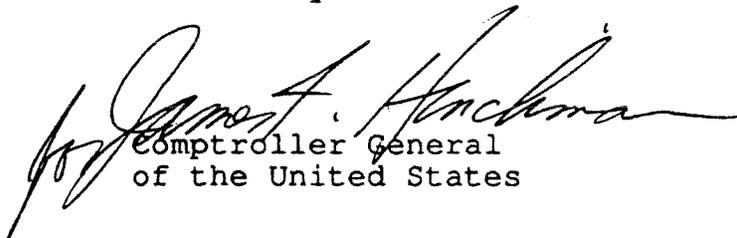
We note that the Deputy Solicitor points to 59 Comp. Gen. 705 (1980) as supporting the proposed indemnification agreement. In that case we carved out a limited exception to the general

^{1/}(...continued)
appropriation is made unless authorized by law." 31 U.S.C. § 1341. The Adequacy of Appropriations Act, 41 U.S.C. § 11 (1988), is also violated by contractual indemnity provisions which subject the United States to indefinite and uncertain liabilities. B-201072, May 3, 1982.

^{2/} The Park Police recently provided us with a copy of a memorandum of understanding that provides that nothing contained in the agreement shall be construed as binding the Park Police and other signatories "to expend in any one fiscal year any sum in excess of funds appropriated for purposes of this Agreement for that fiscal year, or as involving either party in any contract or other obligation for the further expenditure of money in excess of such appropriations."

rule prohibiting contingent indemnities of uncertain and undeterminable amounts.^{3/} There we held that the General Services Administration could procure electric power for government agencies under a contract requiring the customer (the government) to indemnify the utility against liability arising from delivery of the power.^{4/} But we were careful to point out in 62 Comp. Gen. at 364, however, that 59 Comp. Gen. 705 should not serve as precedent. Indeed, except for 59 Comp. Gen. 705, "the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary." 62 Comp. Gen. at 364-365. *4*

Because mutual assistance memoranda of understanding between the Park Police and local authorities are important for effective law enforcement, we will not object to the Park Police temporarily entering into revised agreements with the required indemnification clauses while congressional approval is being sought. These agreements should include provisions limiting the government's liability to appropriations available at the time a loss arises with no implication that Congress be required to appropriate funds to make up for any deficiency.


Comptroller General
of the United States

APPROPRIATIONS/FINANCIAL MANAGEMENT
Appropriation Availability
Amount availability
Antideficiency prohibition
Violation
Indemnification agreement

^{3/} We have not objected in the past to indemnification clauses where the maximum amount of liability is fixed or readily ascertainable, and where the agency had sufficient funds in its appropriation which could be obligated or administratively reserved to cover the maximum liability. Likewise, indemnity contracts that have received statutory approval are also permissible. 62 Comp. Gen. at 365 *4*

^{4/} The utility would not provide services without the indemnity provisions, which were required by tariff, and no other source existed. We found that the indemnity requirement did not discriminate against the government and that the risk of loss was remote. Because the possibility existed, however remote, that future liability could arise in excess of available appropriations, we advised that GSA inform Congress of the situation.