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D. Stolzenberg
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DECISION

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

FILE: B-189395 DATE: April 27, 1978

MATTER OF: Department of Air Force-sewage utility contracts

DIGEST:

Although Environmental Protection Agency (EPA) contemplates that Federal users of local sewage utility services will pay share of EPA construction grants to utility companies, such payment would be improper where existing contracts between Federal users and utilities do not provide basis for such payments.

This is in response to a request by the Department of the Air Force for a decision concerning the propriety of renegotiating or terminating existing Air Force utility (sewage) contracts to comport with the Environmental Protection Agency's (EPA) grant funding policies.

The Air Force has a number of contracts with utilities to provide sewage services for Air Force installations throughout the nation. These contracts follow the prescribed standard format. See Armed Services Procurement Regulation (ASPR) Supplement No. 5, Procurement of Utility Services (October 1, 1974).

Some of these utilities have applied to the EPA for construction grants under the Federal Water Pollution Control Act, 33 U.S.C. 1151 et seq. (Supp. V 1975) to fund expansion or upgrading of their physical plants. However, under EPA Program Requirement Memorandum No. 75-35 (previously Program Guidance Memorandum No. 62), whenever a planned treatment works will jointly serve a municipality and a Federal facility, the portion of construction costs allocable to the Federal facility is not eligible for EPA grant funding (with certain

exceptions). Therefore, the portion of expansion construction allocable to an Air Force installation is not compensable to the sewage utility. Consequently, the utilities seeking EPA grants want the Air Force to compensate them for this shortfall in funding of construction costs, and EPA contemplates that the Air Force will do so. Payment has been suggested through either a lump-sum or by a surcharge added to the Air Force's basic utility service rate. Such a contribution has not been requested of other nonindustrial users of the utility.

Because the Air Force request concerns an EPA program, we afforded EPA an opportunity to present its views on the matter. EPA, however, has declined to submit any formal statement; accordingly, the following discussion reflects the position of EPA as expressed in an EPA letter to the Air Force dated April 20, 1977, which was furnished to us by the Air Force.

The Air Force maintains that it is not subject to a rate increase unless the increase is applied generally to all customers and that it cannot waive its rights under the existing utility contracts. EPA has taken the position that the capital improvements are a reasonable cause for the rate change, and that the new rate and the method of payment are all that need be resolved.

Under these contracts, the utilities have agreed to "furnish, install, operate, and maintain all facilities required to furnish service" at their expense. A change of rates is permitted pursuant to the following contract provision:

> "At the request of either party to this contract with reasonable cause, the rates set forth herein shall be renegotiated and the new rates shall become effective as mutually agreed--provided that any rates so negotiated shall not be in excess of rates to any other customer of the contractor under similar conditions of service." (Emphasis supplied.)

The Air Force concedes that the upgrading of existing plants would constitute "reasonable cause"

for a rate change and that if the rate increase were "a general rate increase to all * * * customers under similar conditions of service," it would be permissible under the contracts involved. Its objection is aimed at the manner in which the increase is being applied--solely to the Air Force-- in alleged violation of the contract provision quoted above.

The EPA's view is that the "similar conditions of service" requirement applies only to other Federal installations in the utility service area. It believes that: "Neither an industrial plant nor a large domestic institution are under 'similar conditions of service' as is a Federal installation."

In our opinion, the "similar conditions of service" clause does not relate solely to equality of rates among Federal installations. The apparent intent of the phrase is to avoid discrimination against the Federal Government in relation to the private sector in application of rate changes. See ASPR Supplement No. 5, supra, para. S5-102. While the contract does not define what it means by this phrase, we believe that it refers to the class and type of service provided by the utility. See ASPR Supp. No. 5, S5-203.2, clause II 3(b)(iii). Therefore, we cannot agree with the EPA that this clause has no bearing on the present discussion. While the contracts provide for rate increases based upon "reasonable cause", and the expansion and improvement of facilities may be said to constitute such reasonable cause, any such rate increase must be assessed upon all customers "under similar conditions of service." Thus, application of a rate increase solely to the Air Force would be in breach of contract provisions.

EPA has suggested that the existing contracts may be renegotiated, or terminated with new contracts negotiated, to provide for the lump-sum payments or increased rates. Renegotiation or termination to permit a rate increase applicable solely to the Federal Government would be tantamount to waiver of the rights of the Government under the existing contracts. The law is well established that, absent a compensatory benefit to the United States, agents and officers of the Government have no authority to modify existing contracts, or to waive contract rights vested in the Government. 40 Comp. Gen. 684 (1961) and cases therein cited. For example, in the cited case, the Government (Veterans Administration) contracted with a county for the use of the county's sewage system. The Government agreed to pay a fixed sum to compensate the county for costs of

construction for expansion of its facilities, and connection of a Veterans Administration Hospital to the sewage system. Prior to commencement of construction, construction costs rose and the county requested a modification of the contract calling for the Veterans Administration to pay its proportionate share of the increased costs. We held that, based on the rule stated above, there was no legal basis for authorizing modification of the contract.

Similarly, we viewed as inappropriate a suggestion that existing fixed price contracts be terminated because of unforeseen increased costs to the contractors, pointing out that a "termination for convenience clause is designed for the Government's benefit and not as a means of relieving contractors from the burdens of contract performance." Veterans Administration, B-108902, May 17, 1974, 74-1 CPD 262.

Moreover, although EPA appears to believe there is statutory authority for its position, EPA has not provided us with any specific information in this regard and we find nothing in the provisions or legislative history of the Federal Water Pollution Act or the more recent Clear Water Act of 1977, Public Law 95-217, 91 Stat. 1566, which suggests a Congressional intent that agencies having on-going contracts for utility services agree to fund a portion of capital improvements made by the utility through anything other than a general rate increase as provided for by the contracts.

In view of the foregoing, it is our opinion that since the existing contracts do not provide for lump-sum or increased installment payments for capital improvements, the shortfall in funding expansion of the systems should be covered either through a general rate increase to all customers, as specified in the contract, or by some other appropriate means.

R. F. Keller

Deputy Comptroller General
of the United States