Cambosos
GGM
14805

DECISION

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

FILE: B-194983 DATE: September 3, 1980

MATTER OF: Government indemnification of public utilities against loss arising out of sale of power to Government.

DIGEST: 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.

This decision concerns the propriety of agreement by the General Services 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.

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

~~011917~~ 113210

> 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 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 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.

Harry R. Van Cleve

For the Comptroller General
of the United States