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Mr. Boyle
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DECISION



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

FILE: B-198531

DATE: September 25, 1980

MATTER OF: Isotec, Inc.

DIGEST:

Contention that agency's price structure for sale of certain isotopes to other Federal agencies is not in accord with Economy Act of 1932 and recent GAO decision because agency's prices do not reflect indirect costs, including depreciation and interest, is without merit since, even if we could say other considerations authorized recovery of costs beyond what Economy Act required, we could not say that other considerations required that these costs be recovered. Furthermore, there is no clearly established policy of Department of Energy requiring competition in private sector where result would be increased costs to Government.

Isotec, Inc. (Isotec), questions the Department of Energy's (Energy) price structure for the sale of isotopes Helium-3, Neon, Krypton, Xenon, and Argon to other Federal agencies. Isotec states that it produces and sells nearly all of the same stable isotopes that Energy does. Isotec contends that Energy's prices to other Federal agencies should be increased from current levels to include certain indirect costs.

Energy explains that it reviews and revises prices for stable isotopes sold by its Mound Facility based on its operation for each fiscal year (FY). Energy reports that the FY 1980 prices for stable isotopes, except Helium-3, were revised in accordance with our decision in Washington National Airport; Federal Aviation Administration; intra-agency reimbursements under 31 U.S.C. 686 (1970), 57 Comp. Gen. 674 (1978),

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[Protest Involving Agency Price Structure]

which held that [unless otherwise necessary to accomplish some compelling congressional goals, prices charged other Federal agencies under the Economy Act shall not include items of indirect cost which are not significantly related to costs incurred by the selling agency in providing the items sold the requisitioning agency and which are not funded from currently available appropriations.] Energy also reports that its FY 1980 prices for Helium-3 are the same as its FY 1979 prices which were revised to eliminate items of indirect cost. It appears that Energy's position essentially is that our Washington National Airport decision required the elimination of depreciation and interest previously included in prices to Federal users.

It is Isotec's position that our decision does not compel the action taken by Energy in excluding depreciation and interest in determining costs, but Energy should charge its components and other Federal agencies the higher prices that Energy charges commercial customers. Isotec states that in the Washington National Airport decision over 98 percent of the airport revenues were from non-Government sources and here commercial users make up over 85 percent of the market. [further, the primary customers for Energy's isotopes are not Federal agencies. Thus, Isotec concludes that any benefit to the Government by processing and marketing such isotopes "is incidental at best" and since Energy expects to recover all of its costs on sales to commercial customers, they must absorb the depreciation and interest not included in sales to Federal users.]

[Isotec argues that Energy's policy--of not competing with private industry and of encouraging development of commercial sources for stable isotopes--will be ineffective if Energy distributes these isotopes to Federal users at costs which do not reflect depreciation and interest. Isotec also argues that it is in the best interest of the Government if Energy's isotope distributing activities are self-sustaining, which would necessitate reflecting indirect costs in the price structure.]

Also, Isotec argues that, pursuant to Energy's announced policy, Energy should not have reduced prices while Isotec's petition--that Energy withdraw

from distributing certain stable isotopes--is pending. Isotec states that it could furnish Helium-3 at prices well below Energy's current other Federal agency prices if Energy were to withdraw from processing and selling this isotope to commercial and Federal users.

Finally, Isotec notes that there are other companies (including Isotec) that can or do supply stable isotopes in sufficient quantities to satisfy commercial and Government needs, and for that reason Energy should not be in the business; while Energy necessarily is involved in providing the feed material for Helium-3, it has no unique position with regard to other stable isotopes in markets commercially or to other Federal agencies.

In certain circumstances, the Economy Act permits executive departments to provide supplies and services to other Federal agencies "but proper adjustments on the basis of actual cost of the materials, supplies, or equipment furnished" shall be made. Our Office has considered the question of which direct and indirect costs composed "actual cost" within the meaning of the Economy Act.

Our Washington National Airport decision explained our general views concerning the recovery of unfunded costs. There, we noted that while the law and its legislative history are silent as to what was meant by the term "actual cost," the legislative history indicates that the Congress intended to effect savings for the Government as a whole by: (1) generally authorizing the performance of work or services or the furnishing of materials pursuant to inter- and intra-agency orders by an agency of Government in a position to perform the work or service; (2) diminishing the reluctance of other Government agencies to accept such orders by removing the limitation upon reimbursements; and (3) authorizing inter- and intra-departmental orders only when the work could be as cheaply or more conveniently performed within the Government as by a private source.

Thus, we concluded that the only elements of cost that the act requires to be included in computing reimbursements are those which accomplish these identified congressional goals and whether any additional elements

of cost should be included would depend upon the circumstances surrounding the transaction. We noted that all direct costs are recoverable, but only those indirect costs which are funded out of the performing agency's currently available appropriations and which bear a significant relationship to the performance of the work or service are recoverable. We also noted that to be recoverable, indirect costs must be shown, either actually or by reasonable implication, to have benefited the requisitioning agency, and that they would not otherwise have been incurred by the performing agency.

The specific question presented in the Washington National Airport decision was whether the Federal Aviation Administration should charge itself and other Government agencies rental rates based on full cost (including depreciation and interest) for space at Washington National Airport and Dulles International Airport. We held that since these airports were established with the intent that they be operated as self-sustaining commercial entities cost-rate structures and concessional arrangements established so as to assure recovery of operating costs and an appropriate return on the Government's investment during the airports' useful life, fees collected from both Government and non-Government users should include depreciation and interest. In other words, the facts in the Washington National Airport case, coupled with the flexibility inherent in the Economy Act, led to the conclusion that depreciation and interest could be collected in that case, if not in all others.

Thus, [our decision held that the only costs the Economy Act requires be recovered from other agencies are direct costs and indirect costs funded from currently available appropriations.] Beyond this, while not required, if necessary to accomplish some congressionally identified goal, recovery of additional indirect costs may be authorized.

[Energy's reduction of its prices based upon its excluding from costs items representing depreciation and interest satisfies the requirements of the Economy Act, since Energy is recovering no more than what the Economy Act standing alone requires other agencies to

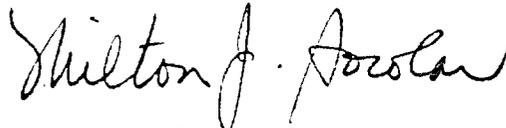
reimburse Energy for isotopes provided to them under authority of this act. Furthermore, even if we could say that other considerations authorized Energy to recover full costs from other agencies beyond what the Economy Act required, we could not say that they required that these costs be recovered.]

[Isotec argues that it is Energy's policy not to compete with private industry,] citing the document published at 31 Fed. Reg. 3247-48 (1965). Even if this policy applied, Energy has indicated that it retains the right to produce isotopes for Government use when the Government is a substantial user or the use is of special programmatic interests to Energy and procurement from private industry would result in significantly higher costs to the Government. Thus, it is not Energy's policy to withdraw from production to promote competition in the private sector if the net result is higher costs to the Government. Yet that is the result Isotec urges with regard to nonradioactive isotopes.]

Furthermore, while the furthering of competition in the private sector is one of Energy's statutory tasks (22 U.S.C. § 2011(b) (1976)), it is not the only one. Thus, we cannot say that Energy's failure to exercise any discretion it might possess to recover full costs is an abuse of discretion since it may be serving some other purpose Energy is also charged with fulfilling.

[Thus, Isotec's allegations--(1) that the Government's benefit is incidental at best, (2) that private sector sources are not being fostered, and (3) that Isotec could sell at lower than current prices if Energy withdrew from the market--are insufficient to provide a basis for our Office to object to Energy's determination to recover only the costs the Economy Act requires be recovered from other Federal agencies.]

Accordingly, we find no basis to question Energy's price structure for the sale of isotopes.



For The Comptroller General
of the United States



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

B-198531

September 25, 1980

The Honorable Tony P. Hall
House of Representatives

Congress

Dear Mr. Hall:

We refer to your letter to our Office dated April 28, 1980, in regard to the request of Isotec, Inc., that our Office temporarily approve and permit a certain schedule of prices to be used by the Department of Energy (Energy) regarding the sale of certain isotopes.

By decision of today, copy enclosed, we have concluded that we have no basis to question Energy's price structure.

Sincerely yours,

Milton J. Fowler

For The Comptroller General
of the United States

Enclosure