

McConnell

DECISION



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

21726
118286

FILE: B-201072

DATE: May 3, 1982

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

DIGEST:

An FPR clause providing for Government assumption of contractor liability for property damage or physical injury to third persons in cost-reimbursement supply and research and development contracts violates the Anti-Deficiency Act, 31 U.S.C. § 665(a), and the Adequacy of Appropriations Act, 41 U.S.C. § 11, because it subjects the Government to a contingent liability in an indefinite amount.

The Department of Health and Human Services (HHS) requests our opinion regarding that agency's use of the "Insurance--Liability to Third Persons" clause which Federal Procurement Regulations (FPR) §§ 1-7.204-5 and 1-7.404-9 allow agencies to include in cost-reimbursement supply and research and development contracts.

The clause, set forth in FPR § 1-7.204-5, provides in part:

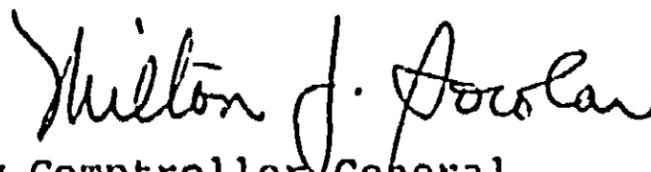
"(c) The contractor shall be reimbursed * * * without regard to and as an exception to the 'Limitation of Cost' or the 'Limitation of Funds' clause of this contract, for liabilities to third persons for loss of or damage to property * * * or for death or bodily injury, not compensated by insurance or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

Use of the same clause in the same types of contracts is provided for under Defense Acquisition Regulation §§ 7-203.22 and 7-402.26.

HHS believes that the FPR clause may violate the Anti-Deficiency Act, 31 U.S.C. § 665(a) (1976), and the Adequacy of Appropriations Act, 41 U.S.C. § 11 (1976). We agree.

This Office has consistently held that, unless otherwise authorized by law, an indemnity provision in a contract which subjects the United States to an indefinite and uncertain liability contravenes those acts. See, e.g., 35 Comp. Gen. 85 (1955); 7 id. 507 (1928); B-201394, April 23, 1981. The FPR indemnity clause falls squarely within those contractual obligations which are prohibited under the acts. It seeks to commit Government funds for the payment of liabilities which are undetermined at the time of contracting and whose cost may exceed available appropriations. We know of no statutory authority which would except the clause from the provisions of 31 U.S.C. § 665(a) and 41 U.S.C. § 11.

Thus, the present FPR clause should not be used. We have suggested revised language in our prior decisions, however, which would make an indemnification clause acceptable. See, e.g., B-202518, January 8, 1982. The clause should limit the extent of the Government's liability to appropriations available at the time a contingency arises and should explicitly provide that nothing may be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.



Acting Comptroller General
of the United States



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-201072

May 3, 1982

Mr. James T. Brannan
Director
Defense Acquisition Regulatory Council
Office of the Under Secretary of Defense
for Research and Engineering

Dear Mr. Brannan:

I am enclosing for your information a copy of our decision of today to the Secretary of Health and Human Services concerning the legality of using the "Insurance--Liability to Third Persons" clause which Federal Procurement Regulations §§ 1-7.204-5 and 1-7.404-9 allow to be included in cost-reimbursement supply and research and development contracts. Defense Acquisition Regulation §§ 7-203.22 and 7-402.26 provide for use of the same clause for the same types of contracts.

Sincerely yours,

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Assistant General Counsel

Enclosure



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-201072

May 3, 1982

The Honorable Donald Sowle
Administrator for Federal
Procurement Policy
Office of Management and Budget
Executive Office of the President

Dear Mr. Sowle:

I am enclosing for your information a copy of our decision of today to the Secretary of Health and Human Services concerning the legality of using the "Insurance--Liability to Third Persons" clause which Federal Procurement Regulations §§ 1-7.204-5 and 1-7.404-9 allow to be included in cost-reimbursement supply and research and development contracts. The proposed Federal Acquisition Regulation includes a similar clause in Subpart 28.4 at Section 52.xxd.

Sincerely yours,

Ronald Berger

Ronald Berger
Assistant General Counsel

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-201072

May 3, 1982

Mr. Philip G. Read
Director
Federal Procurement Regulations
Directorate
Office of Acquisition Policy
General Services Administration

Dear Mr. Read:

I am enclosing for your information a copy of our decision of today to the Secretary of Health and Human Services concerning the legality of using the "Insurance--Liability to Third Persons" clause which Federal Procurement Regulations §§ 1-7.204-5 and 1-7.404-9 allow to be included in cost-reimbursement supply and research and development contracts.

Sincerely yours,

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Assistant General Counsel

Enclosure