



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nuclear Regulatory Commission payment of "added factor" to Department of Energy for employee administrative costs included in charges for performing research authorized under the Energy Reorganization Act of 1974

File: B-248225

Date: April 6, 1993

DIGEST

1. Department of Energy (DOE) is authorized to include 3.2 percent "added factor" for departmental administrative costs in charges currently paid by Nuclear Regulatory Commission (NRC) to DOE for research performed on reimbursable basis by DOE on behalf of NRC under section 205(c) of Energy Reorganization Act 1974, 42 U.S.C. § 5845(c).
2. There is no clear statement in Energy Reorganization Act or its legislative history that section 205(c) of the act requires NRC or DOE to limit elements of costs to be included in NRC's reimbursements for research performed under the act by DOE for NRC.
3. Provisions in 1978 interagency agreements contemplate pricing will omit "added factor" and will accord with DOE's current general pricing policy, which today includes added factor charges. Now policy is consistent with GAO recommendations, with statutory requirement that NRC reimburse DOE for research services, and with fundamental agreement of DOE and NRC that DOE pricing policy governs pricing of DOE charges for services to NRC.

DECISION

The Deputy Chief Financial Officer/Controller of the Nuclear Regulatory Commission requests a decision on the propriety of the inclusion of certain costs in the charges currently paid by the Nuclear Regulatory Commission (NRC) to the Department of Energy (DOE) for research performed by DOE on behalf of NRC under the Energy Reorganization Act of 1974.

Since the beginning of fiscal year 1992, DOE has included in its charges for performing work for other federal entities, including NRC, a 3.2 percent "added factor" to recover DOE

general and administrative costs and other support costs associated with this work, including employee administrative or overhead costs allocable to activities such as reviewing and monitoring non-DOE work. NRC contends it is exempt from this "added factor" because section 205(c) of the act, and the terms of a 1978 DOE-NRC Memorandum of Understanding and a 1978 Interagency Agreement on Budget, Funding, and Financial Management Responsibilities, give NRC special status when placing work at DOE facilities. For the reasons discussed below, we conclude that DOE's recovery of the "added factor" from NRC is not legally objectionable.

BACKGROUND

The Energy Reorganization Act of 1974, Pub. L. No. 93-438, 42 U.S.C. § 5801 et seq., reorganized and consolidated various energy-related functions of the federal government in two new entities: the Energy Research and Development Administration (ERDA) and an independent Nuclear Regulatory Commission. ERDA was to be responsible for policy planning, coordination, and management of research and development programs in all areas of energy, including those in the field of nuclear energy formerly performed by the Atomic Energy Commission.¹ NRC retained the licensing and related regulatory functions, and nuclear safety research responsibilities of the former Atomic Energy Commission.

Under the act, NRC is authorized to contract for research necessary to the performance of its functions, and to obtain requested research services from DOE and every other federal agency on a reimbursable basis. To this end, section 205(c) of the act, 42 U.S.C. 5845(c), specifically provides:

"(c) The Administrator of the Administration and the head of every other Federal agency shall--

"(2) furnish to the Commission, on a reimbursable basis, through their own facilities or by contract or other arrangement, such research services as the Commission deems necessary and requests for the performance of its functions;" (Emphasis added.)

¹ERDA was terminated in 1977, and its duties and authorities transferred to the Department of Energy, by the Department of Energy Organization Act, Pub. L. No. 95-91, 42 U.S.C. §§ 7101, 7151(a). For convenience, we shall refer to DOE throughout this decision, except in quoted materials.

On February 24, 1978, NRC and DOE entered into a Memorandum of Understanding (MOU) to establish for the two agencies an overall management policy "with regard to interagency relationships in the conduct of research programs and related activities." Section II.A. of this memorandum states in relevant part:

"For Commission research programs . . . , the Commission shall plan and fund the work, scope changes, and terminations. DOE will conduct these Commission projects or programs on a reimbursable basis in accordance with DOE established pricing policy

"Reimbursement of work performed by one agency for the other will not include costs associated with Government employees and their overhead, except . . . where the agencies agree that such employee costs should be on a reimbursable basis." (Emphasis added.)

On October 27, 1978, NRC and DOE entered into an Interagency Agreement on Budget, Funding and Financial Management Responsibilities (Funding Agreement) that provided in part:

"7. Pricing Policy

"DOE pricing policy will prevail in all reimbursable charges to NRC. Copies of such pricing policy and field office data noting specific indirect cost factors will be provided to the NRC controller on an annual basis, or more frequently as changed. Charges to NRC will be in accordance with current DOE pricing policy as defined in DOE Interim Management Directive (IMD) 1701 and ERDA Manual 1701. In accordance with Part II.N of ERDA Manual 1701-2, charges to NRC will exclude depreciation and the added factor when work tasks are undertaken in accordance with Section 205.c, Public Law 93-438." (Emphasis added.)

In 1984, DOE issued a statement of the general policy on the pricing of its materials and services.³ This policy was to "establish prices and charges to the other Federal agencies at the Department's full cost less depreciation and the Department's added factor." DOE Order 2110.1A (pricing

²The Funding Agreement does not define "added factor."

³DOE Order 2110.1A, "Pricing of Departmental Materials and Services," July 14, 1988, was the successor version of this policy.

order), section 8.a. (emphasis added).⁴ This section further provides:

"8.a.(1) Full cost (which includes both depreciation and the Department's added factor) may be charged to other Federal agencies, with approval on a case-by-case basis by the Controller, provided a full cost sale is necessary to accomplish a congressional goal, policy, or interest.

"8.a.(2) Full cost also may be charged when the statutory authority for an agreement with another Federal agency is other than the Economy Act and is consistent with the particular statutory authority." (Emphasis added.)

The Order defines "added factor" to include "general and administrative costs and other support costs that are incurred for the benefit of the Department, an organizational unit, or a material or service as a whole." Order, section 6.f.(5).

Nonrecovery of added factor charges from government agencies was consistent with GAO's 1978 decision that, unlike direct costs, indirect costs were not recoverable on work for other agencies (WFO) under the Economy Act, 31 U.S.C. §§ 1535-1536, unless the costs were greater than the performing agency would have incurred for its own work. 57 Comp. Gen. 674, 682 (1978). DOE Order 2110.1A stems in part from this decision, which the order cites as a reference in section 5.v.

In 1984, we modified this interpretation of the Economy Act, and held that the distinction between recovery of direct and indirect costs on WFO was not supportable, and required indirect costs (with the exception of depreciation) to be reimbursed to the performing agency. B-211953, Dec. 7, 1984.

In 1988, DOE revised its pricing order, but the pricing policy of waiving added factor charges to federal government customers was essentially unchanged.

In 1989, we reviewed DOE's controls over its work for other agencies, and concluded that DOE's pricing policy was inconsistent with this decision. We recommended that DOE

⁴Section 6.f. of this order defines "full cost" as "All direct costs and all allocable costs of producing the material or providing the service consistent with generally accepted accounting principles."

charge other federal agencies for the costs incurred in reviewing, approving, and overseeing its WFO.³

In January and March 1990, DOE issued memoranda to the heads of its field elements, spelling out changes to its added factor pricing policy consistent with GAO's decisions and audit report, and advising that WFO was to be on a "full cost recovery" basis for all federal customers, beginning in fiscal year 1992.

On October 1, 1991, DOE began charging NRC and other federal agencies the 3.2 percent "added factor" for departmental administrative costs, including personnel costs. On the same day, DOE issued interim guidance on the new pricing policy applicable to all customers of the Department, and stated that formal changes to the pricing order were being prepared. With respect to its charges for WFO, the interim guidance states "The price or charge for materials and services sold to [other federal agencies] shall be the Department's full cost less depreciation" Section 8.b. (Interim Guidance Pending Revision of DOE Order 2110.1A).

NRC contends that these changes conflict with the provisions of the 1978 MOU and the 1978 Funding Agreement, which have not been revised or renegotiated. We requested a formal statement of DOE's position on this matter, but to date have not received a response.

ANALYSIS

NRC bases its contention that it is exempt from DOE's new added factor pricing policy on the terms of the 1974 act, and those of the 1978 MOU and the 1978 Funding Agreement. NRC's statutory argument relies on the fact that section 205(c) of the act provides specific authority for the placement of NRC work at DOE facilities. Because of this, NRC states that it is not bound by the Economy Act, or by interpretations of that act and its requirements, when it places and pays for necessary research work with DOE. Instead, it relies on the provisions of the MOU and the Funding Agreement.

As noted earlier, section 205(c) of the act requires DOE to provide requested research services to NRC on a reimbursable basis. This provision authorizes what NRC calls "special access" to DOE facilities, and NRC correctly states that, as a result, these interagency research arrangements are not made pursuant to the Economy Act, which was enacted to

³GAO/RCED-89-21, "DOE Controls Over Work for Others," February 9, 1989.

provide authority for the interagency provision of services in the absence of other specific statutory authority. See, e.g., 64 Comp. Gen. 370, 381 (1985), which dealt with whether certain interagency details of personnel should be on a reimbursable basis.

There is no clear statement in the act or its legislative history, however, that section 205(c) authorizes NRC or DOE to limit elements of costs to be included in NRC's reimbursements for the use of DOE research facilities. Neither the act nor its legislative history defines or explains what is meant by "reimbursable basis." A review of relevant congressional committee reports reveals simply that government agency cooperation with NRC was universally described as being provided on a reimbursable basis. E.g., H. Rep. No. 707, 93d Cong., 1st Sess., 22 (1973); H. Rep. No. 1445, 93d Cong., 2d Sess., 34 (1974). Neither the express terms of section 205(c) nor the section when read with its legislative history, therefore, appears to require the exclusion of otherwise appropriate costs from charges to NRC for research performed under the act, or to distinguish these charges from the actual costs reimbursable under the Economy Act.

NRC also relies on the previously quoted provisions from the 1978 MOU and Funding Agreement to support its contention that it is exempt from payment of DOE's "added factor." As noted, DOE conducted research under the MOU "on a reimbursable basis in accordance with DOE established pricing policy," but employee costs and related overhead were excluded unless the agencies agreed otherwise. MOU, section II.A. Under the Funding Agreement, added factor charges also were explicitly excluded from charges to NRC for work under section 205(c). Funding Agreement, section 7.

Neither the MOU nor the Funding Agreement has been revised or renegotiated since 1978, nor are they required to be.⁶ As noted in the provisions of the Funding Agreement quoted above, however, the parties contemplated frequent notification to the NRC Controller of changes in the policy itself, and charges to NRC were to be "in accordance with current DOE pricing policy" as defined in DOE directives. Id. (Emphasis added.) In addition, the basic principle of pricing under the Funding Agreement is that DOE pricing

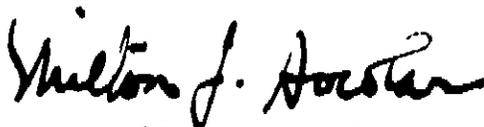
⁶We note that DOE recently imposed on new or modified reimbursement agreements with other agencies a requirement that they contain a maximum 5-year expiration date. NRC reimbursable agreements are exempt from this provision. Section IX.d.(9) of DOE Order 2200.6, Financial Accounting (October 24, 1988).

policy would prevail in all reimbursements to be made by NRC.

With the issuance of the October 1, 1991, revision of its general pricing policy, DOE's charges for reimbursable costs are now consistent with our recommendations. Thus, DOE's "current policy," which is the guiding principle under the 1978 MOU and 1978 Funding Agreement, is now to include added factor charges in all WFO. The provisions in the 1978 agreements to exclude added factor charges merely reflect the then-prevalent DOE pricing policy. They do not overcome the basic statutory requirement that NRC reimburse DOE for research services, nor, in our judgment, conflict with the fundamental agreement of the agencies that DOE pricing policy governs the pricing of DOE services.

CONCLUSION

We find no inconsistency between DOE's latest formulation of current pricing policy and the Energy Reorganization Act, and conclude that DOE's charging of added factor costs to NRC is not legally objectionable.

for 
Comptroller General
of the United States