

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

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FILE: B-212529**DATE:** May 31, 1984**MATTER OF:** Nuclear Regulatory Commission--
Reimbursement of Institute for
Electrical and Electronics Engineers**DIGEST:**

1. The Nuclear Regulatory Commission (NRC) is not liable for the expenses the Institute for Electrical and Electronics Engineers (IEEE) incurred in reliance upon the NRC's agreement to promulgate a rule to establish a laboratory accreditation program when the NRC decided later not to promulgate the rule. The agreement to issue the rule is against public policy and therefore unenforceable. NRC is not liable in contract for a promise which is void.
2. The NRC is not liable under the doctrine of promissory estoppel for the expenses the IEEE incurred in reliance upon the NRC's agreement to promulgate a rule to establish a laboratory accreditation program when the NRC decided later not to promulgate the rule. A promise is binding under the doctrine only if the promisor should have expected that his promise would induce the promisee to take substantial action. It was not reasonable for the NRC, when it agreed to promulgate the rule, to expect the IEEE to make substantial expenditures since, under the Administrative Procedure Act, the NRC still had to consider the views of interested persons before deciding whether to issue a final rule.
3. NRC cannot reimburse the IEEE on a quantum meruit basis for expenses the IEEE incurred in preparation for a laboratory accreditation program

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which the NRC later decided not to conduct. Reimbursement on the basis of quantum meruit is proper only if the Government has received and accepted a benefit from the services for which a party is seeking payment. The NRC received no benefit from the activities conducted by the IEEE in preparation for conducting the accreditation program which consisted of renting office space, hiring additional staff, printing application forms and holding seminars.

4. Public Law 85-804 permits certain agencies to provide extraordinary relief to contractors when necessary to facilitate the national defense. While GAO does not have jurisdiction to make determinations under Public Law 85-804, use of that statute to permit NRC to reimburse professional organization for expenses incurred in preparation for a laboratory accreditation program which NRC later decided not to conduct appears beyond its intended scope.
5. NRC may not expend appropriated funds for the purpose of preserving its credibility with professional organizations with which it interacts on a continuing basis. Policy factors such as maintaining credibility cannot justify an expenditure which otherwise lacks legal authority.

The General Counsel of the Nuclear Regulatory Commission (NRC) requested our opinion on whether the Commission may reimburse the Institute for Electrical and Electronics Engineers (IEEE) for expenses it incurred in preparing to carry out an agreement with the NRC which the Commission later failed to carry through to completion. We hold that the Commission is not authorized to reimburse the Institute, as explained below.

Facts

1977, the Commission began to consider revising its environmental qualification standards for nuclear power plant equipment. Environmental qualification consists, in part, of laboratory testing of the equipment to determine how it would function after a nuclear accident. The Commission envisioned that the revised standards would require that the laboratories doing the environmental qualification testing be accredited.

The Commission's staff asked the IEEE in August 1980 to participate in the proposed accreditation program. The Commission sent several letters to the Institute encouraging its participation. The NRC also announced at that time that it was preparing a rule which would require that only accredited laboratories perform equipment qualification testing and that the Commission was working with the IEEE and the American Society for Mechanical Engineers to establish an accreditation program. Moreover, the Director of the Office of Inspection and Enforcement made presentations to the IEEE supporting the proposed program.

The NRC and the IEEE executed a written agreement, effective September 30, 1981, for the accreditation program's implementation. The Institute agreed to be responsible for establishing and conducting the program and to use its best efforts to begin implementing the program during the first calendar quarter of 1982. The agreement further states that the IEEE accepts its responsibility to conduct the accreditation program as a public service in furtherance of the purposes for which the Institute was established. The Commission agreed to issue a rule endorsing the accreditation program and requiring its use after January 1, 1983. It also promised to use its best efforts to promulgate a proposed rule in the first quarter of 1982. However, the agreement did not promise to reimburse the Institute for any expenses it might incur in connection with the proposed accreditation program nor did it promise any other form of compensation.

After the parties signed the agreement, the Institute rented office space, hired additional staff, printed application forms and held seminars in New Orleans and San Francisco to prepare for conducting the accreditation

program. The IEEE stated that it spent approximately \$1.5 million on program preparation as of March 2, 1983.^{1/}

However, the Commission never promulgated the rule requiring that equipment qualification testing laboratories be accredited. The NRC staff recommended that the Commission approve the publication of a notice of proposed rule-making in April 1982. The Commission decided not to issue the notice about a year after the staff recommendation. On May 13, 1983, the Commission informed the IEEE that it no longer intended to issue a notice of proposed rulemaking and that it was terminating their agreement.^{2/}

The NRC General Counsel has concluded that the Commission is not legally obligated to reimburse the Institute for the expenses it incurred in preparing to conduct the accreditation program. We have reviewed the several possible grounds for liability suggested by the NRC, and we agree that there is no legal basis for reimbursement.

Contractual Liability

The IEEE seeks reimbursement of the funds it expended because the Commission breached its agreement to promulgate a rule requiring laboratory accreditation. The NRC is not liable for breach of contract, however, because an agreement by an administrative agency to promulgate a rule is against public policy and therefore unenforceable. Public officials, as servants of the people, must be free to act in the public interest. Thus, agreements by public bodies which interfere with the unbiased discharge of their official responsibilities are void. E.g., School District No. 69 of Maricopa County v. Altherr, 458 P.2d 537 (Ariz. Ct. App. 1969).

In this case, the Commission's agreeing to issue a final rule with specified content restricts the discretion it is bound to exercise under the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), when promulgating rules affecting the public interest. The NRC must follow the procedures set forth in 5 U.S.C. § 553 to promulgate a rule

^{1/} We have not been furnished with a more specific breakdown of this \$1.5 million figure. One member of the IEEE has stated the amount as \$500,000.

^{2/} The agreement provided for termination by either party upon 60 days' written notice.

requiring accreditation of laboratories doing nuclear power plant equipment qualification testing; the rule is invalid if it is not. City of New York v. Diamond, 379 F. Supp. 503, 516 (S.D.N.Y. 1974); Hatch v. United States, 212 F.2d 280 (9th Cir. 1954).

The purpose of the procedures mandated by the APA is to afford interested parties the opportunity to meaningfully participate in the decision-making process. Subsection (b) of 5 U.S.C. 553 generally requires an agency which is considering making a rule to publish a notice of proposed rule-making in the Federal Register. The notice must include either the terms or substance of the proposed rule or a description of the subjects and issues involved. After the notice is printed in the Federal Register, the publishing agency must give interested persons the opportunity to participate in the rulemaking by allowing them to submit written data, views or arguments and possibly oral presentations. 5 U.S.C. § 553(c). Agencies must consider the public comments before issuing a final rule. Id.

If the interested persons have presented persuasive arguments against the rule under consideration, or for modification to it, the proposing agency is supposed to be guided by those views when making its final decision concerning the rule. As the court stated in Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9, 35 (D.C. Cir. 1977):

"The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and 'a concise general statement of [the] basis and purpose' of the rules ultimately adopted. 5 U.S.C. § 553(b)-(c). As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule. * * * To this end there must be an exchange of views, information, and criticism between interested persons and the agency. * * * Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based. * * * Moreover, a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public. * * *"

The Commission, by promising the IEEE that it would issue a laboratory accreditation rule, agreed in effect to disregard any adverse comments it might receive, thereby violating the APA. Such an agreement is in violation of public policy because it thwarts the very purpose of the APA which is to give interested persons the opportunity to influence agency deliberations in the rulemaking process.

Accordingly, the Commission's promise to promulgate a laboratory accreditation rule is void because it violates public policy. It is axiomatic that no recovery may be had in contract on a void promise. The Commission is therefore not liable in contract to the Institute for its failure to carry out its agreement to promulgate the rule.

Promissory Estoppel

The Commission is not liable to the Institute under the doctrine of promissory estoppel. A promise is binding under the doctrine if the promisor should have expected that his promise would induce the promisee to take substantial action, that the promisee in fact took such action and injustice can be avoided only by enforcement of the promise. R.S. Bennett G. Co. v. Economy Mechanical Industries, Inc., 606 F.2d 182 (7th Cir. 1979). The Commission should not have expected that its promise to issue a rule endorsing the laboratory accreditation programs would prompt the Institute to incur the substantial expenses it did by renting office space, hiring staff, printing application forms and holding seminars, at least before a proposed rule was actually issued.

Under paragraph IV-D of the agreement, the IEEE agreed to "use its best efforts to begin implementing the Program during the first calendar quarter of 1982 and to perform surveys at a rate that will give applicants applying by January 1982 a reasonable opportunity to be audited by January 1, 1983." Under paragraph V-A, the NRC agreed (1) to issue a rule requiring use of the accreditation program after January 1, 1983, and (2) to use its best efforts to promulgate a proposed rule in the first quarter of 1982. Assuming that the agreement was otherwise proper, the IEEE could not wait until issuance of a final rule before beginning to incur expenses. In order to fulfill its responsibilities under paragraph IV-D, the IEEE would have to start preparation in early 1982. Thus, the NRC should perhaps have expected that its promise would induce action on the part of IEEE prior to issuance of a final rule--the IEEE would have little choice under the terms of the agreement if it hoped to meet the contemplated time schedule.

However, even if we were to disregard the fact that IEEE, as a matter of law be charged with notice of the requirements of the APA, it was clear from the agreement that a two-step rulemaking process was contemplated. The first step was issuance of a proposed rule, to coincide with the first phase of activity by the IEEE. Although NRC staff recommended issuance of the proposed rule in April 1982, the Commission did not approve it, and in fact took no action until terminating the agreement in May 1983. While we are not implying that reliance on a proposed rule would have been reasonable, we think it was clearly unreasonable for the IEEE to incur expenses when the NRC had not even taken its first step.

Taking the nature of the APA as discussed earlier into consideration--that is, considering that an agency cannot "guarantee" the content of a final rule unless it agrees, in effect, to act arbitrarily--we think there was no basis for the NRC to reasonably expect that its promise, unsupported at the very least by issuance of a proposed rule, would induce substantial expenditures by the IEEE. The NRC's failure to issue a proposed rule should have put the IEEE on notice that implementation of the agreement was not proceeding on schedule and that perhaps something was wrong. In these circumstances, it is difficult to conclude that enforcement of the promise is necessary in order to avoid injustice. Therefore, even if we were to assume that a void promise can trigger liability under the promissory estoppel doctrine, we do not find sufficient basis to apply that doctrine here.

Quantum meruit

The IEEE is not entitled to reimbursement on a quantum meruit basis because the Institute's activities did not benefit the Commission. The premise underlying recovery on a quantum meruit basis is that where performance by one party has benefited another, even in the absence of an enforceable contract between them, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party. B-207557, July 11, 1983.

Before we can approve a quantum meruit payment, several conditions must be met. The agency involved must have the authority to expend its funds to procure the services performed. Also, the party who provided the services must have acted in good faith, the amount to be paid must represent a

reasonable value for the services performed, and the Government have received and accepted a benefit from the services performed. 40 Comp. Gen. 447 (1961); B-207557, supra.

The Commission did not benefit from the activities for which the Institute is seeking payment (i.e., renting offices, hiring additional staff, printing application forms and holding seminars in New Orleans and San Francisco). Accordingly, the Commission cannot reimburse the Institute for the expenses it incurred in conducting those activities on the basis of quantum meruit.

Public Law 85-804

Although this Office does not have jurisdiction to review agency determinations regarding payments under the authority of Public Law 85-804, in our opinion, reimbursing the IEEE on the basis of that statute's authority is questionable.

Public Law 85-804, codified at 50 U.S.C. § 1431-1435 (1976), grants to the President the authority to authorize any agency which exercises functions in connection with the national defense to enter into contracts or into amendments or modifications of contracts without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that it would facilitate the national defense.^{3/} 50 U.S.C. § 1431 (1976). The NRC's predecessor agency, the Atomic Energy Commission, was granted authority to use Public Law 85-804 by Executive Order No. 10789, issued on November 14, 1958. 23 Fed. Reg. 8897. Under 50 U.S.C. § 1434, all actions taken under Public Law 85-804 must be reported to Congress annually, and the reports are published in the Congressional Record. The report must, for expenditures in excess of \$50,000, describe the services and include justification for the action taken. This Office does not have authority to

^{3/} Public Law 85-804 is effective only during a national emergency declared by the Congress or the President and for 6 months after the termination of the emergency or until an earlier date the Congress designates by concurrent resolution. 50 U.S.C. § 1435 (1976). However, for purposes of Public Law 85-804, the national emergency which was otherwise terminated by 50 U.S.C. § 1601 (the Korean Conflict) remains in effect. 50 U.S.C. § 1651; B-193687, August 22, 1979.

make determinations under Public Law 85-804. B-195080, August 1, 1979; B-188042, February 10, 1977; B-185709, June 1, 1976.

The legislative history of Public Law 85-804 indicates that it was intended to be "primarily of an emergency nature," and that it was intended to be used to facilitate the national defense, not merely authority for agencies to "dispense aid solely for the benefit of contractors." S. Rep. No. 2281, 85th Cong., 2d Sess. 3 (1958). "[T]he primary consideration is, and must be, whether such aid will facilitate the national defense." *Id.* The legal memorandum prepared by the NRC concludes that "the use of P.L. 85-804 for purposes of compensating IEEE could be interpreted as extending [its] authority beyond reasonable bounds." While we could not legally object to a reimbursement by the NRC under the authority of Public Law 85-804, we are inclined to agree with the NRC that to invoke Public Law 85-804 in this case would be beyond the intended scope of that statute.

Preservation of credibility

Finally, the NRC notes that denial of reimbursement in this case might damage the Commission's credibility with professional organizations in the future, and asks whether this factor might constitute sufficient grounds for reimbursement notwithstanding the lack of a legal obligation. The answer, of course, is no.

The expenditure of public funds must be grounded on legal authority. More specifically in relation to this case, the payment of a claim must be based on the liability of the United States either under a particular statute or under some recognized legal theory. Policy factors such as maintaining credibility cannot justify an expenditure which lacks legal authority.

In addition, 31 U.S.C. § 1301(a) (formerly 31 U.S.C. § 628) restricts the use of appropriated funds to the purposes for which they were appropriated. We certainly do not question that it is important for the NRC to maintain good

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relations with the organizations with which it interacts. However, we find it difficult to view a payment to IEEE in this case as reasonably necessary to carry out the objects of NEPA appropriation when the objective of maintaining good relations could have been effectively accomplished without the expenditure of Federal funds.

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