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B-197583, Jan 19, 1981

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DIGEST: ARCHITECT OF THE CAPITOL MAY NOT INDEMNIFY POTOMAC ELECTRIC POWER COMPANY (PEPCO) FOR LOSS OR DAMAGES RESULTING FROM PEPCO'S PERFORMANCE OF TESTS ON EQUIPMENT INSTALLED IN GOVERNMENT BUILDINGS OR FROM THE USE OF CERTAIN IMPULSE DEVICES OWNED BY PEPCO WHICH COULD BE INSTALLED IN GOVERNMENT BUILDINGS TO MONITOR ELECTRICITY USES FOR CONSERVATION PURPOSES EVEN THOUGH LOSS OR DAMAGES DO NOT RESULT FROM PEPCO'S NEGLIGENCE. INDEMNITY AGREEMENT WOULD SUBJECT UNITED STATES TO CONTINGENT INDETERMINATE AMOUNT OF LIABILITY IN CONTRAVENTION OF 31 U.S.C. SEC. 665 AND 41 U.S.C. SEC. 11. UNLIKE SITUATIONS WHERE WE HAVE SANCTIONED USE OF INDEMNITY AGREEMENTS, HERE GOVERNMENT HAS OTHER MEANS AVAILABLE TO PROVIDE TESTING AND MONITORING DESIRED. FURTHERMORE, IT HAS NOT PREVIOUSLY BEEN ACCEPTING TESTING SERVICE OR USING IMPULSE DEVICES FROM PEPCO UNDER SIMILAR INDEMNITY AGREEMENT. B-194983, SEPTEMBER 3, 1980, 59 COMP.GEN. , DISTINGUISHED.

ARCHITECT OF THE CAPITOL - INDEMNIFICATION OF PUBLIC UTILITY AGAINST LOSS:

THE ARCHITECT OF THE CAPITOL ASKS WHETHER HE MAY AGREE TO INDEMNIFY AND HOLD HARMLESS THE POTOMAC ELECTRIC POWER COMPANY (PEPCO) FOR ANY AND ALL LOSS, LIABILITY, COST, AND EXPENSE RESULTING FROM PEPCO'S PERFORMANCE OF CERTAIN TESTS ON EQUIPMENT INSTALLED IN GOVERNMENT BUILDINGS OR FROM USE OF CERTAIN IMPULSE DEVICES OWNED BY PEPCO WHICH COULD BE INSTALLED IN GOVERNMENT BUILDINGS TO MONITOR ELECTRICITY USE FOR CONSERVATION PURPOSES.

THE ARCHITECT HAS INDICATED THAT DURING THE RENOVATION OF HOUSE OFFICE BUILDING ANNEX NO. 2, HIS OFFICE PROCURED SEVERAL HIGH VOLTAGE TRANSFORMERS FOR INSTALLATION IN THE BUILDING AND THAT PRIOR TO ENERGIZATION THEY WERE REQUIRED TO BE INSPECTED AND TESTED. PEPCO INDICATED THAT WHILE IT PREFERRED TO PERFORM THESE TESTS ITSELF WITHOUT COST TO THE GOVERNMENT IN ORDER TO PROTECT ITS EQUIPMENT AND OTHER CUSTOMERS, IT WOULD PERMIT OTHERS TO PERFORM THE INSPECTION AND TESTING IN ACCORDANCE WITH GUIDELINES PRESCRIBED BY IT.

WHEN THE ARCHITECT REQUESTED PEPCO TO PERFORM THE INSPECTION AND TESTING ON THE TRANSFORMERS, PEPCO STATED THAT IT WAS REQUIRED BY REGULATION ADOPTED BY THE DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION TO HAVE A DOCUMENT SIGNED BY AN AUTHORIZED OFFICIAL OF THE ARCHITECT'S OFFICE, WHICH PROVIDED AS FOLLOWS:

"IN CONSIDERATION OF OUR SO MAKING SUCH TESTS, YOU AGREE, FOR YOURSELF AND YOUR SUCCESSORS AND ASSIGNS, TO HOLD HARMLESS AND INDEMNIFY US AND OUR SUCCESSORS AND ASSIGNS FROM AND AGAINST ANY AND ALL LOSS LIABILITY COST AND EXPENSE ON ACCOUNT OF ANY INJURY OR DAMAGE TO PERSONS OR PROPERTY (OTHER THAN TO OUR EMPLOYEES OR PROPERTY) THAT MAY OCCUR, AS A RESULT OF ANY MALFUNCTIONING OR NONFUNCTIONING OF

SUCH EQUIPMENT, UNLESS IT SHALL BE FOUND, ON THE BASIS OF SUBSTANTIAL EVIDENCE OTHER THAN MERE EVIDENCE THAT WE WERE MAKING, OR HAD MADE, SUCH TESTS, THAT NEGLIGENCE ON OUR PART WAS THE APPROXIMATE CAUSE OF SUCH INJURY OR DAMAGE."

THE ARCHITECT REFUSED TO SIGN THIS AGREEMENT BECAUSE OF HIS CONCERN THAT HE WOULD BE IN VIOLATION OF THE ANTI-DEFICIENCY ACT, 31 U.S.C. SEC. 665(A), SINCE HE WOULD BE CREATING AN OBLIGATION WHICH COULD POTENTIALLY BE IN EXCESS OF ANY AVAILABLE APPROPRIATION. SINCE INDEMNIFICATION WAS REQUIRED BEFORE PEPCO COULD DO THE WORK, THE ARCHITECT HAD THE INSPECTIONS AND TESTS PERFORMED BY EMPLOYEES OF HIS OFFICE WITH THE INFORMATION BEING PROVIDED TO PEPCO FOR ITS APPROVAL. WHILE OTHER SOURCES WERE CONSIDERED TO PERFORM THE TESTING, THEY WERE REJECTED BECAUSE OF THE SUBSTANTIAL COSTS INVOLVED.

THE ARCHITECT HAS INDICATED THAT THE RENOVATION AND CONSTRUCTION OF BUILDINGS IS CONTINUING AND WILL INCLUDE THE INSTALLATION OF EQUIPMENT FOR WHICH TESTING WILL ALSO BE NECESSARY. HE HAS ALSO INDICATED THAT IN THE FUTURE HE WOULD PREFER TO HAVE THE TESTS PERFORMED BY PEPCO BECAUSE OF ITS EXPERIENCE.

OFFICIALS OF THE ARCHITECT'S OFFICE HAVE ALSO INFORMALLY ADVISED THIS OFFICE THAT PEPCO WILL INSTALL IMPULSE DEVICES FOR PURPOSES OF MONITORING ENERGY USE AND CONSERVATION ONLY IF IT IS HELD HARMLESS AGAINST ANY AND ALL LOSSES RESULTING FROM USE OF THE DEVICES NOT RESULTING FROM PEPCO'S NEGLIGENCE. PRODUCTION AND INSTALLATION OF THE DEVICE BY THE EMPLOYEES OF THE ARCHITECT'S OFFICE IS AN ALTERNATIVE WHICH WOULD RESULT IN SUBSTANTIAL ADDITIONAL COST.

THIS OFFICE HAS RECENTLY CONSIDERED WHETHER THE GENERAL SERVICES ADMINISTRATION (GSA) COULD ENTER INTO AGREEMENTS WITH ELECTRIC UTILITIES FOR THE PROVIDING OF ELECTRICITY WHICH WOULD INDEMNIFY AND HOLD HARMLESS THE UTILITIES FOR ANY INJURY OR DAMAGE TO PERSONS AND PROPERTY OCCASIONED BY THE PROVISION OF THE UTILITY SERVICES. B-194983, SEPTEMBER 3, 1980. THE QUESTION ARISES BECAUSE OF THE LONG LINE OF OUR 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. SEC. 665(A) (THE ANTI- DEFICIENCY ACT) AND 41 U.S.C. SEC. 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, 59 COMP.GEN. 369 (1980); 35 ID. 85 (1955); 16 ID. 803 (1937); 7 ID. 507 (1928). SEE ALSO CALIFORNIA PACIFIC UTILITIES CO., V. UNITED STATES, 194 CT.CL. 703, 715-716. B-194983, WE POINTED OUT THAT:

"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. 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. 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." GOVERNMENT INDEMNIFICATION OF PUBLIC UTILITIES AGAINST LOSS ARISING OUT OF SALE OF POWER TO GOVERNMENT, B-194983, SEPTEMBER 3, 1980, 59 COMP.GEN. .

WE NOTE THAT, AS IN THE GSA SITUATION, THE INDEMNIFICATION PROVISION CONCERNING THE TESTING IS REQUIRED BY REGULATIONS ADOPTED BY THE LOCAL PUBLIC SERVICE COMMISSION AND WE HAVE NO INFORMATION THAT IT IS BEING APPLIED IN A DISCRIMINATORY MANNER. ALSO, AS IN THE GSA CASE, THE POSSIBILITY OF LOSS WOULD SEEM REMOTE. HOWEVER, UNLIKE THE GSA CASE, HERE THERE IS ANOTHER SOURCE FOR PERFORMING THE TEST, THAT IS, THE GOVERNMENT EMPLOYEES WHO IN FACT HAVE PERFORMED THE TESTS IN THE PAST. AN EVEN MORE IMPORTANT DISTINCTION, THOUGH, IS THAT UNLIKE THE SITUATION IN THE GSA CASE, THE ARCHITECT HAS NOT PREVIOUSLY BEEN ACCEPTING THE TESTING SERVICES OR USING THE IMPULSE DEVICE FROM PEPCO AND HAS THEREFORE NOT PREVIOUSLY AGREED TO THE LIABLITY REPRESENTED BY THE PROPOSED INDEMNITY AGREEMENTS. IN THE GSA CASE, GSA MERELY SOUGHT TO ENTER A CONTRACT ACCEPTING THE SAME SERVICE AND ATTENDANT LIABILITY, PREVIOUSLY SECURED UNDER A NON-NEGOTIABLE TARIFF, AT A RATE MORE ADVANTAGEOUS TO THE GOVERNMENT. HERE, HOWEVER, THE GOVERNMENT HAS OTHER MEANS AVAILABLE TO PROVIDE THE TESTING AND MONITORING DESIRED.

CONSEQUENTLY, THE ARCHITECT'S SITUATION DOES NOT FALL WITHIN THE NARROW EXCEPTION CREATED BY THE GSA DECISION TO THE GENERAL RULE AGAINST ENTERING INTO INDEMNITY AGREEMENTS SUBJECTING THE UNITED STATES TO A CONTINGENT AND UNDETERMINED LIABILITY IN VIOLATION OF 31 U.S.C. SEC. 665(A) AND 41 U.S.C. SEC. 11. THE ARCHITECT MAY NOT AGREE TO INDEMNIFY PEPCO AGAINST ANY LOSS RESULTING FROM THE TESTING OF GOVERNMENT-OWNED EQUIPMENT INSTALLED IN GOVERNMENT BUILDINGS OR FROM USE OF CERTAIN IMPULSE DEVICES OWNED BY PEPCO BUT INSTALLED IN GOVERNMENT BUILDINGS TO MONITOR ELECTRICITY USE.

HOWEVER, THIS DOES NOT MEAN THAT THE ARCHITECT IS WITHOUT RECOURSE TO USE PEPCO'S TESTING OR INSTALLATION SERVICES WITHOUT INDEMNIFYING PEPCO. FIRST, WE SUGGEST THAT HE TAKE STEPS TO INSTITUTE A RULE CHANGE WITH THE DISTRICT'S PUBLIC UTILITY COMMISSION. IN HIS SUBMISSION, THE ARCHITECT STATES:

"***COUNSEL FOR THE DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION HAS INFORMED MY STAFF THAT IF MY POSITION ON THIS MATTER IS CORRECT THAT FEDERAL AGENCIES MAY NOT ENTER INTO OPEN-ENDED INDEMNIFICATION AGREEMENTS, A RULE CHANGE SHOULD BE INSTITUTED WITH COMMISSION."

WHETHER THIS ATTEMPT TO CHANGE THE RULE WOULD BE SUCCESSFUL, WE CANNOT SAY.

IF THE ATTEMPT IS UNSUCCESSFUL, WE SUGGEST THAT THE ARCHITECT EXPLORE WITH PEPCO THE POSSIBILITY OF SUBSTITUTING A REPUTABLE INSURANCE COMPANY FOR THE GOVERNMENT IN PROVIDING THE REQUIRED INDEMNIFICATION FOR PEPCO FOR ANY LIABILITY ARISING BY

VIRTUE OF PEPCO'S NON-NEGLIGENT PERFORMANCE OF THE TEST OR INSTALLATION OF THE IMPULSE DEVICE. WE WOULD NOT OBJECT TO PAYMENT BY THE ARCHITECT OF INSURANCE PREMIUMS IN A REASONABLE AMOUNT TO COVER PEPCO'S RISK OF LIABILITY. SEE OUR DECISION, PROJECT STORMFURY AUSTRALIA INDEMNIFICATION FROM DAMAGES, 59 COMP.GEN. 369 (1980). (WE ASSUME THAT THE AMOUNT OF THE PREMIUMS, ADDED TO THE COSTS OF PEPCO'S PERFORMANCE, WILL STILL BE LESS THAN THE EXPENSE TO THE GOVERNMENT IF THE ARCHITECT HAD TO PERFORM THE WORK WITH HIS OWN STAFF.)

ASSUMING THAT THE INSURANCE ALTERNATIVE IS ACCEPTABLE, THE AGREEMENT WITH PEPCO SHOULD MAKE IT CLEAR THAT THE GOVERNMENT ASSUMES NO FINANCIAL OBLIGATION TO ANYONE, REGARDLESS OF THE AMOUNT OF LIABILITY IMPOSED ON PEPCO, BEYOND THE DUTY TO PAY THE INSURANCE PREMIUMS IN THE AGREED UPON AMOUNT.