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B-33801 October 27, 1943

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The Honorable, The Secretary of War

My dear Mr. Secretary:

I have a letter of October 13, 1943, from Brigadier General L. R. Groves, Corps of Engineers, requesting advise as to whether this office would be required to object to otherwise proper payments made under two provisions which are to be incorporated into a certain cost-plus-a-fixed fee contract proposed to be entered into by your Department.

Certain payment provisions of the proposed contract were considered in my decision of April 19, 1943, to you. However, it now is stated in the letter of October 13, that a number of unforeseen developments have delayed the actual signing of the formal contract and have brought about the necessity for making two important changes therein. The two changes are stated to consist of the inclusion in the contract of additional provisions whereby the contractor is authorized to utilize sums advances to it by the Government for the purposes (1) of establishing and replenishing a collateral or guarantee fund of funds to secure the payment of premiums for such insurance coverage as may be required or approved by the contracting officer and (2) of establishing and replenishing an "Employees Benefit Fund" from which special payments are to be made to or on account of employees who may be totally and permanently disabled or killed as a result of exposure to unpredictable hazards that may be encountered in the course of work under the contract.

With respect to the first of these funds, it is stated that a public liability insurance policy has been obtained by the contractor, with the approval of the contracting officer, from an insurance company and an indemnity company, which policy provides for the establishment and maintenance with the said companies of a collateral fund of $10,500,000 to secure the payment of premiums. It is stated further that this was the only basis on which an insurance company could be found which would undertake to underwrite the risk. With respect to the Employees Benefit Fund, it is stated that such fund is to be established and maintained by the contractor with Government funds, in the amount of $5,000,000, because no insurance company could be found which would undertake to underwrite the risk. With respect to the Employees Benefit Fund, it is stated that such fund is to be established and maintained by the contractor with Government funds, in the amount of $5,000,000, because no insurance company could be presuaded to underwrite this risk and that, for reasons of sound public policy and to protect the persons who will be employed under the contract against the unpredictable hazards involved, as well as to protect the United States from

suits and claims, it will be necessary to maintain this fund. Also, it is stated that both the collateral insurance fund and the Employees Benefit Fund are to remain available for use throughout a period of ten years after termination of manufacturing operations under the contract involved.

The pertinent provisions of the contract pertaining to the establishing of the colleteral of guarantee fund for securing payment of insurance premiums are contained in sections 8 and 9 of Article XIV thereof. Section 8 provides, in substance, that the contractor is authorized to make such payments in advance out of the special account made available to it by the Government and that the contractor shall not be subject to any liability with respect to the funds so advanced except to return or credit to the Government such amount of said funds as shall be returned to the contractor by the insurance is to contain a provision providing for the handling of the funds so advanced in the following manner: Until liquidated, the advanced funds are to be deposited by the carrier or carriers in a special bank account at a bank which is a member of the Federal Reserve System of a bank which insured with the Federal Deposit Insurance Corporation. Such funds are to be carried separate and distinct from the general or other funds of the carried separate and distinct from the general or other funds of the carrier of carriers and are to be used exclusively for carrying out the contract of insurance and not for any other business of the carrier of carriers. It is proposed that all or any part of the funds advanced may be invested by the carrier or carriers in United States Government securities and that the interest earned from such investments, less expenses incurred in the investment, management, custody and safekeeping of the funds shall be paid to the contractor for the account of the Government. The insurance carrier or carriers are to have the right to draw on the special account subject only to the provisions of the contract of insurance. The bank or banks with which the funds may be deposited are to furnish peridic reports to the contractor showing the amount of cash on hand in the special account and the face amount of the securities deposited with it and, also, are to report any increase or decrease in the face amount of securities purchased by the carrier with the advanced funds.

The pertinent provisions of the contract relating to the establishment of the Employees Benefit Fund are contained in Article XXXIII of proposed contract, which recites that, in view of the serious and unusual hazards which recites that, in view of the serious and unusual hazards which may be involved in the performance of the contract and since the contractor has been unable, despite extended efforts with the assistance of the contracting officer, to obtain satisfactory insurance coverage for its employees, the Government agrees that the contractor shall have the right to establish, maintain and utilize a benefit frund from which payment--in addtion to those provided for by workmen's compensation laws or other statutes or under the terms of the contract's employee who become totally and permanently disabled or die as a result of such hazards. Therefore, the article authorizes the contractor to withdraw from time to time from sum advanced to it by the Government, pursuant to Article XIV of the contract, amounts sufficient to establish and replenish an Employees Benefit Fund of $5,000,000. The benefit fund is to be established immediately upon the execution of the contract and is to be maintained for a period of ten years after the termination of manufacturing operations thereunder.

The said Article XXXIII provides further that whenever the contractor shall determine, with the approval of the contracting officer, that any employee has become totally and permanently disabled or has died as a result of any hazards

resulting from performance of the contract, the contractor shall have the right to pay from the benefit fund to such employee or to his named beneficiary or legal representative, the sum of $10,000, but that when any such payment has been made to an employee who has become totally and permanently disabled, no further payment shall be made by reason of the death of such employee. The payment is to be made only upon the securing of a release relieving the contractor and the Government, to the extent of the payment, from all claims of the employee on account of any disability or death, except claims under workman's compensation laws or other occupational disease statutes.

Also, it is provided in Article XXXIII that the benefit fund is to be held in each in a special account in a bank which is a member of the Federal Reserve System or that it may be invested, in whole or in part, in United States Government securities which securities are to be kept in a safety deposit box in the same bank. The bank is to report to the contracting officer any increase or decrease in the face amount of any securities which any of the benefit funds and, in addition, the bank is to furnish periodic reports to the contracting officer showing the amount of cash on hand in the special deposit account and the face amount of securities in the safety deposit box. Any interest earned from the investment of the benefit fund, less expenses incurred in connection with the investment, management and safekeeping of said fund, is to paid over to the Government by the contractor. The benefit fund is to be used by the contractor solely for the purpose set forth in the contract and any sums remaining in such fund at the expiration of ten years after the termination of manufacturing operations are to be paid or credited to the Government by the contractor.

It appears from the record that, pursuant to the authority vested in him by the First War Powers Act, 1941, the President has approved the entering into of the proposed contract and the incorporation therein, if deemed advisable by the Chief of Engineers, of provisions providing that all work under the contract is to be performed at the expense of the Government and that the Government shall indemnify and hold the contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and from any cause whatever arising out of or connected with the work. The assumption of such liability by the Government has been undertaken in Article XXXIII of the proposed contract and, with respect thereto, you were advised in my decision of April 19, 1943, that, for the reasons stated therein, this office would not be required to object to otherwise proper payments to the contractor in accordance with said article to the extent that funds may be available therefor.

It appears from the provisions of Article XXXIII of the proposed contract, outlined above, that the Employees Benefit Fund, in the amount of $5,000,000, which is to be established by the contractor from funds advanced by the Government, is to be set aside and used for the sole purpose of making benefit payment to or on account of employees who may be totally and permanently disabled or who may die as a result of hazards arising out of the performance of the contract. Likewise, while Article XIV does not specifically state that the collateral of guarantee fund of $10,500,000, to be established pursuant thereto, is to be used for the purpose of making premium payments to insurance carriers as they become due, it appears that such is the contemplated procedure, as section 9 of said article provides that, upon the request of the contractor from time to time throughout the effective period of the contract, the Government shall advance to the contractor, without interest, such sums as may be necessary

to replenish in full the collateral or guarantee fund provided for by section 8 therefo. Hence, it appears that the funds to be established would be used solely for the purpose of fulfilling the obligations assumed by the Government under Article XXXII of the contract to indenify and hold the contractor harmless against damage, including personal injuries and death of persons and damages to property, arising out of or connected with the work.

Since it is reported in the letter of October 13, supra, that, in view of the unusual nature of the work to be performed under the proposed contract, the establishment of the collateral or guarantee insurance fund and the Employees Benefit Fund are the only means by which the Government may fulfill its obligations under the contract, and since it appears that, under the plans outlines in Article XIV and XXXIII of the contract for the handling of the funds which would be established, the interest of the Government therein would be adequately safeguarded and protected and that any amounts remaining in the funds at the expiration of the ten-year period are to be returned to the United States, you are advised that this office will not be required to object to otherwise proper payments made under the two previsions here involved.

It is to be understood that such advance as are required to be made from time to time throughout the effective period of the contract, pursuant to section 9 of Article XIV, necessarily are subject to availability of funds therefor.

Respectfully,

(Signed) LINDSAY C. WARREN Comptroller General of the United States