

E.I. DuPont De Nemours vs. United States of America, No 99-101, November 13, 2002

On November 13, 2002, The United States Court of Federal Claims rendered an opinion of particular interest to the Army in general and to AMC in particular. Senior Judge James Turner opined that even though the Army entered into a contract with broad indemnification and reimbursement clauses with E.I. Dupont in 1940 to limit DuPont's liability, these clauses were void and unenforceable since they violated the Anti-Deficiency Act, 31 U.S.C. § 1341.

In 1940 the Department of the Army entered into a cost-plus-fixed-fee contract with DuPont to build and operate a chemical production facility in Morgantown, West Virginia, the Morgantown Ordnance Works (MOW). The United States owned the plant, and all of its products and DuPont would acquire the site, design and construct the plant and staff and operate the plant. The plant produced poisonous chemicals including methanol, hexamine, ammonia, formaldehyde and heavy water. To shield DuPont from liability, the contract contained extremely broad, unconditional indemnification and reimbursement clauses common to this type of production facility during the early 1940s. The clause reads:

It is the understanding the parties hereto, and the intention of this contract, that all work under this Title III is to be performed at the expense of the Government and that the Government shall hold (DuPont) harmless against any loss, expense (including expense of litigation), or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of the work under this Title III....”.

In 1946, the U.S. terminated the contract and entered into a termination supplement to the contract in accordance with the Contract Settlement Act. In 1984, the United States Environmental Protection Agency (U.S.E.P.A) notified DuPont that the plant needed to be remediated in accordance with the Comprehensive Environmental, Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601. After 1946 the MOW changed ownership on several occasions and it is unclear as to how much of a Potentially Responsible Party DuPont is under CERCLA. In fact, this case arose after DuPont had incurred significant costs in assessing the remediation site. DuPont asserted that the government was responsible for all CERCLA remedial action costs in accordance with the terms of the indemnification clause and submitted claims to the Contracting Officer. When the Contracting Officer did not respond to DuPont's claim in sixty days, DuPont treated this lack of a response as a denial of the claim and filed suit in the spring of 1999.

The United States Court of Federal Claims found that the indemnification and reimbursement clauses showed a clear intent by the government to assume nearly all liability incurred by DuPont in execution of the contract. This specifically includes CERCLA costs, even though these costs were incurred after termination of the contract. However, the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) states that “An Officer or employee of the United States Government may not ... involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” The Court relying on the ADA, states that the ADA and its predecessors, prohibits the inclusion of indemnification clauses without specific appropriation or statutory authority.

The plaintiff also argued that even if the ADA prohibits open ended indemnification clauses, this prohibition does not apply to the reimbursement clause in this specific contract. DuPont argued that the Act of July 2, 1940, Pub. L. No. 76-703, 54 Stat. 712, specifically authorized the use of cost-plus-fixed fee method of contract formation and the reimbursement clause is authorized by the “unless authorized by law” language of the ADA. The reimbursement clause reads:

The Contractor shall be reimbursed in the manner hereinafter described for such actual expenditures in the performance of the work under this contract, heretofore or hereinafter incurred, as may be approved or ratified by the Contracting Officer and as are included in the following items:

Losses, expenses, and damages, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the contractor in connection with the work ...”

The Court rejects this argument since the 1940 act only authorizes the execution of contracts “out of the moneys appropriated for the War Department for national-defense purpose...” and such a limitation is consistent with the ADA.

The Court ends its opinion by stating that the indemnification clause is void and unenforceable, even though almost full indemnification was the clear intent of both parties in the contract and suggests that the plaintiff considers pursuing a Congressional Reference case under 28 U.S.C. §§ 1492 & 2509.

DuPont is expected to appeal and currently two other cases with similar issues are in the courts.

This decision is of particular interest since many Government-Owned, Contractor-Operated (GOCO) munitions plants constructed prior and during World War II were operated under cost plus fixed fee contracts that contained a very similar or identical clause to that the Court ruled unenforceable. A total of 88 plants produced munitions for the Army during World War II. A version of this clause was still in use in the 1970's in contracts for operation of the remaining GOCO munitions plants that were actively producing for the Army. Contractors regarded it as a cornerstone of the agreement between the Government and the plant operators. Its unenforceability as a result of the DuPont decision greatly increases the potential financial exposure of past GOCO operators to claims for environmental damage from plant operation, several of which have arisen in recent years.

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