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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: District of Columbia–Purchase of Commercial Insurance Against Catastrophic Risks

File: B-287209

Date: June 3, 2002

DIGEST

The United States government's policy of insuring its own risks of loss, based on the magnitude of the government's resources and the wide dispersion of risk, does not apply to a District of Columbia proposal to purchase commercial insurance to cover catastrophic or unforeseeable risk, since the U.S. government's resources would not be available to cover any loss sustained by the District.

DECISION

The District of Columbia Corporation Counsel requested an advance decision concerning whether the District of Columbia may use its appropriated funds to purchase insurance to cover some of its catastrophic exposures to risk, *e.g.*, loss or damage to government property and tort liability, which may exceed its available financial resources. For the reasons set forth below, the United States government's policy of insuring its own risks of loss, based on the magnitude of the government's resources and the wide dispersion of risk, does not apply here since the U.S. government's resources would not be available to cover any loss sustained by the District. Accordingly, the District, consistent with any applicable laws and policies of the District of Columbia, may use non-earmarked appropriated funds generated by District revenues to purchase insurance.

BACKGROUND

It is a well-established policy of the federal government that, unless expressly authorized by statute, a federal agency may not expend funds for insurance to cover loss of property or tort claims. Historically, the Office of the Corporation Counsel of the District of Columbia has applied this so-called self-insurance rule to the District of Columbia since the District government, in using appropriated funds, is generally subject to the same requirements of federal appropriations law as if it were a federal

agency. However, in revisiting this issue, the Counsel now believes that this rule is inapplicable for loss of property or tort claims against the District. Counsel argues that there is no U.S. Treasury money available to the District to cover such losses either through specific authorization or appropriation act provisions or through the Judgment Fund established in 31 U.S.C. § 1304.[1] Since it does not have access to federal funds for this purpose, including the federal portion of its appropriated funds, any loss or damage would be payable from the District of Columbia's funds.

The fact that the District of Columbia must bear the costs of liability was stated affirmatively in section 11723 of the National Capital Revitalization and Self-Government Improvement Act, Pub. L. 105-33, Aug. 5, 1997, as follows:

"SEC. 11723. LIABILITY

(a) DISTRICT OF COLUMBIA. – The District of Columbia shall defend any civil action or proceeding…in any court or other municipal, state, or federal forum against the District of Columbia or its officers, employees, or agents, and shall assume any liability resulting from such an action or proceeding.

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(c) UNITED STATES. – The United States, its officers, employees, and agents, and its agencies shall not-

(1) be responsible for the payment of any judgments, liabilities or costs resulting from any action or proceeding against the District of Columbia or its agencies, officers, employees, or agents;

(2) be subject to liability in any case on the basis of the activities of the District of Columbia or its agencies, officers, employees, or agents; or

(3) be subject to liability in any case under section 1979 of the Revised Statutes (42 U.S.C. § 1983)."

The Corporation Counsel notes that, while virtually all funds that the District of Columbia receives and spends have to be approved as part of a congressional appropriation, most of the funds are derived locally, generated by local taxes and assessments, and not from federal sources. Federal funds in the District's appropriation are usually designated for specific purposes (e.g., college tuition support for resident students, incentives for adoption of resident children, and assistance for the District's commercial revitalization program). District of Columbia Appropriations Act, 2002 (FY2002 Appropriations), Pub. L. 107-96, December 21, 2002. The Counsel further notes that the District's approved annual

[1] The Judgment Fund is a permanent, indefinite appropriation available to pay certain settlements and judgments entered against the United States.

budget contains appropriations for non-personal services and other activities that, consistent with the government's mission as a whole and the missions of specific government agencies, would authorize the purchase of such insurance.

The Counsel describes the decision-making process proposed for the procurement of insurance by the District of Columbia as follows:

> "I am advised that the Mayor's Office of Risk Management will consider procuring insurance to cover some or all of the District government's catastrophic exposures to risk *only* if analysis of all relevant factors shows that it will be more economical for the government to procure such insurance rather than to continue self-insuring. Relevant factors in this analysis may include the cost of private insurance as compared with the District's historical costs for (1) handling loss and damage to government property, (2) tort settlements and judgment, (3) non-legal staff who evaluate loss and damage to government property and resolve tort claims before litigation, and (4) lawyers who defend tort actions after they are filed in court. Another factor would be the District's financial ability to absorb potential catastrophic losses while maintaining appropriate service levels…Overall, I understand that the effort to evaluate the pros and cons of purchasing insurance will focus on conserving the government's resources and ensuring sound business-like practices."

DISCUSSION

It has long been the policy of the United States to assume its own risks. Hence, appropriated monies of the United States are generally not available for the payment of insurance premiums in the absence of specific statutory authority. 21 Comp. Gen. 928, 929 (1942); B-237654, Feb. 21, 1991. This rule is applicable to insurance against tort liability as well as insurance against losses caused by fire, tornado or other catastrophic events. 19 Comp. Gen. 798 (1940). It arose because the magnitude of the government's resources and the wide dispersion of the types and geographical location of the risks made a self-insurance policy generally more advantageous to the government. See 19 Comp. Gen. 211, 214 (1939); B-175086, May 16, 1972.

However, this practice of self-insurance is one of policy, not of statutory law, and applies only to insurance of the U.S. government's risk. 55 Comp. Gen. 1321 (1976); B-244473.2, May 13, 1993. Thus, we have recognized exceptions to the general rule when the economy sought to be obtained under this rule would be defeated, when sound business practice indicates that a saving can be effected, or when services or benefits not otherwise available can be obtained by purchasing insurance. Id.

The policy of self-insurance has not been strictly applied in circumstances, such as those for government corporations or similar entities, where the risk for which protection is desired is not that of the U.S. government. For example, we found that the Federal Home Loan Bank Board could purchase insurance covering risk of loss to a new building it was constructing. 55 Comp. Gen. 1321 (1976). While sums are

appropriated to the Board every fiscal year for its administrative expenses, since the original source of these funds is the Federal Home Loan Banks themselves, the Banks were bearing the costs of construction of the building. Therefore, any loss or damage would be payable from the Federal Home Loan Bank System funds and not from appropriated funds. Id.

We also concluded that the self-insurance policy does not apply to the Panama Canal Commission because the Commission, unlike most agencies, operates on a self-sustaining basis and derives its operating funds solely from outside revenues. B-217769, July 6, 1987. The U.S. government's resources are not available to the Commission. Thus, the Commission could purchase insurance based upon an administrative determination of necessity. Id.

In a similar circumstance we found that the Virgin Islands Company's operating funds were available for payment of premiums on contracts insuring its property against loss from fire, hurricane, marine perils, etc., with the insurance running to the Company rather than the United States. 21 Comp. Gen. 928 (1942). We recognized that we had previously held that, since the property and resources to which the Virgin Islands Company holds title were primarily derived from federally appropriated funds, the funds derived from the operation of the Company are generally subject to the same restrictions and limitations applicable to the expenditures of appropriated funds by federal agencies and departments. Id. Nevertheless, we did not regard these restrictions as prohibiting the Company from expending funds for objects that were within the Company's corporate powers and reasonably necessary to the conduct of the corporate business. Id. Therefore, it was the duty of the Company's directors to take such action as is dictated by normal business practices for the protection and preservation of the Company's property. Id.

The facts and circumstances of these decisions are analogous to those of the District of Columbia in seeking to purchase insurance. While not a state, the District of Columbia is a municipal corporation with its own functions and broad legislative powers over local maters, separate and distinct from those of the federal government. 60 Comp. Gen. 710 (1981). See also District of Columbia v. Owens-Corning Fiberglass Co., 604 F. Supp. 1459 (1985). The United States is not liable for claims against the District of Columbia since they are separate and distinct legal entities. See Bradshaw v. United States, 443 F.2d 759 (D.C. Cir., 1971). As noted earlier, section 11723 of the National Capital Revitalization and Self-Government Improvement Act, Pub. L. 105-33, Aug. 5, 1997, reflects this distinction. Indeed, by operation of subsection (a)(3), the Judgment Fund established by 31 U.S.C. § 1304 is available only for payments of amounts owed by the United States under judgments and Justice Department compromise settlements. 31 U.S.C. § 1304(a)(3). See, e.g., B-198202, December 29, 1980 (the Judgment Fund was unavailable to reimburse Pennsylvania for the cost of an adverse judgment where the United States was not a party to the suit). In addition, section 11723(c)'s affirmative direction that the District of Columbia "shall assume any liability" resulting from any action brought

against it and its officers and employees indicates that "payment is …otherwise provided for," 31 U.S.C. §1304(a)(1), and thus, the District of Columbia must pay the District's settlements and judgments arising out of property loss and tort claims.

The District of Columbia, as a municipal corporation, uses appropriated revenues to cover its catastrophic exposures to risk. In the absence of insurance, the "appropriated revenues" come from its own locally-generated revenues, not from payments, grants or other sums obtained from the U.S. Treasury. In the case of claims settlements or judgments under $10,000, the District of Columbia pays the claims out of the budget of the agency named in the claim or suit. See FY 2002 Appropriations, Pub. L. 107-96, § 137; D.C. Code § 2-402 (2001). The Settlement and Judgments Fund (S&J Fund), a separate account in the District's General Fund, is used to pay all other settlements and judgments. According to a follow-up submission by the District of Columbia Principal Deputy Corporation Counsel, the amount apportioned for the S&J Fund, $23.45 million, is the same as that in FY 2001. This figure is based on projections concerning the number and amount of claims against the District but does not cover losses from catastrophic and unforeseeable tort claims of the kind that are not factored into the amount apportioned to the S&J Fund. Because the potential unquantified liability of the District government may significantly exceed the $23.45 million apportioned to the S&J Fund, having a catastrophic loss insurance alternative would assist the District government to contain some of this risk.

Given the unique status of the District of Columbia as the seat of the U.S. Government, as well as host to a number of international entities and embassies, the District may be particularly vulnerable to catastrophic loss. As with the Federal Home Loan Bank Board, Panama Commission, and Virgin Islands Company decisions discussed above, the District of Columbia desires insurance protection not to cover the risk of the United States Government, but that of the District government. The resources of the United States are not available to the District of Columbia to cover the risk of a catastrophic loss. The District must cover such losses from its own revenues. These funds are significantly more limited than the resources of the federal government and make self-insurance by the District more problematic.

Thus, as in the cited decisions, the federal policy of insuring its own risks of loss does not apply here. The District may use its appropriated funds derived from its own revenues, not otherwise earmarked by law, and consistent with the laws and policies of the District of Columbia, to incur an expense reasonably necessary or proper to the accomplishment of an authorized purpose. Accordingly, should the District conclude that it would be a prudent use of these funds to purchase commercial insurance to protect against catastrophic loss, we would not raise a legal

objection to such use. Should the District so decide we would suggest that the District disclose in its detailed budget submission for its annual appropriation the financial justification supporting such decision.

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General Counsel