29 0

File: 541.460.000n
C.G.

THE MEMPHIS DEPOT
TENNESSEE

ADMINISTRATIVE RECORD
COVER SHEET

AR File Number 29

Copy 29 1 Received 3-31-93 File: C.G. 541.460.2

29

DEFENSE LOGISTICS AGENCY
HEADQUARTERS
CAMERON STATION
ALEXANDRIA, VIRGINIA 22304-6100

REPLY REFER TO DLA-G

03 MAR 1993

Mr. E. Joseph Sanders
Assistant General Counsel
State of Tennessee Department of
Environment and Conservation
Office of General Counsel
401 Church Street
Nashville, Tennessee 37243-1548

SUBJECT: FFA for Defense Distribution Region Central, Memphis, Tennessee

Dear Mr. Sanders:

Thank you once again for hosting our last negotiating session in December. Although we were unable to come to agreement on several major areas of concern to the State, I feel that we did make significant progress with both the State and EPA on the remaining language.

As you explained in the meeting, the State still objects to the compromise language that DLA proposed for the clauses entitled "Reservation of Rights", "Force Majeure" and "Stipulated Penalties." Our inability to agree to all of the changes you proposed in those clauses was based on guidance from the Office of the Deputy Assistant Secretary of Defense, Environment (DASD-E), and relates to the fact that many of the changes you requested would significantly alter the scope and meaning of model language previously negotiated by DOD, EPA, the National Governors' Association (NGA), and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO).

Following our December meeting, Mr. Lillo and I met with the staff member responsible for FFA language at DASD-E, in an effort to gain approval for the changes that you desire. With respect to the "Stipulated Penalties" provision, we were unable to convince DASD-E to go beyond the language in the Albany, Georgia FFA. We were more successful in convincing DoD to accept your proposed changes in the "Reservation of Rights" and "Force Majeure" clauses. Our final proposal on both of those clauses is very close to the language that you requested.

I have enclosed copies of the draft language approved by DASD-E for use in the Memphis Agreement. Please review the clauses and determine whether the State can sign the Agreement with these changes.

I think you will agree that the ultimate aim of this Agreement is to streamline and hasten the cleanup process. While we appreciate the State's interest in gaining the symbolic right to directly assess penalties, the likelihood of any events that would trigger the penalty clause is low. Given our apparent consensus on the remaining language in the draft Agreement, it would be unfortunate if this one issue prevented the execution of a three party FFA.

Regardless of the outcome of our negotiations, we will continue to provide the State with copies of all primary and secondary documents generated under the Agreement, and the State will continue to receive reimbursement in accordance with the terms of the Defense/State Memorandum of Agreement (DSMOA).

Please feel free to give me a call at (703) 274-6158 if you have any questions about our proposal. I look forward to hearing from you.

Sincerely,

James M. Carr

JAMES M. CARR
Assistant Counsel

Encl

cc: DLA-W (Mr. Lillo)
DDRC-G (Ms. Krueger)
CEHND (CPT Dell'Orio)
USEPA Region IV (Ms. Atkins)

XXIV. FORCE MAJEURE

A. Force Majeure shall mean any event arising from causes beyond the control of a Party that causes a delay in or prevents the performance of any obligation under this Agreement. Examples of events that may constitute a Force Majeure include, but are not limited to, acts of God, fire; war; insurrection; civil disturbance; explosion; unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance; adverse weather conditions that could not be reasonably anticipated; unusual delay in transportation; restraint by court order or order of public authority; inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses due to action or inaction of any governmental agency or authority other than the party claiming the Force Majeure, or delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence.

B. Depending on the facts, Force Majeure may also include any strike or labor dispute not within the control of the parties affected thereby and, for EPA and DLA only, insufficient availability of appropriated funds, if DLA shall have made timely request for such funds as part of the budgetary process as set forth in Paragraph XXXV (Funding) of this Agreement. TDEC does

not agree that lack of funding can ever constitute a Force Majeure.

C. The listing of examples of events that may constitute a Force Majeure does not create a presumption that such events will in every instance be a Force Majeure. The parties shall have the right to invoke dispute resolution as to whether or not any particular event constitutes a Force Majeure and/or to contend that any particular event does not constitute Force Majeure in any action brought to enforce this Agreement.

XXX. RESERVATION OF RIGHTS

A. The Parties shall exhaust their rights under this Agreement, including Section XXV, Dispute Resolution, prior to exercising any rights to judicial review that they may have.

B. The Parties, after exhausting their remedies under this Agreement, expressly reserve any and all rights they may have under any law, including but not limited to CERCLA, all provisions of the Hazardous Waste Management Act of 1977, T.C.A. Section 68-46-101 et seq or any provision of any other State, Federal, or local law, including any laws pursuant to a federally authorized program, where those rights are not inconsistent with the provisions of this Agreement, CERCLA or the NCP. In addition, by entering into this Agreement and despite any other provision contained herein, the Parties do not waive their sovereign immunity, except as otherwise provided by law.

C. Nothing in this Agreement shall limit the discretion of DLA, EPA or TDEC to enter into an agreement with any other potentially responsible party for the performance of a remedial investigation, feasibility study, or remedial action at or in the vicinity of the Facility if EPA, in consulation with DLA and TDEC determines that such a party is qualified to do the work and the remedial investigation, feasibility study, or remedial action activities will be done properly by such other party under the

provisions of Section 120(e)(6) of CERCLA, 42 U.S.C. Section 9620(e)(6).

D. This Agreement shall not be construed as a bar or release of any claim, cause of action, right to assess penalties, or demand in law or equity including but not limited to any right TDEC may have in relation to DLA's failure to comply with any term or condition of this Agreement, or for DLA's failure to comply with any schedule or deadline established pursuant to this Agreement or for any violation of Tennessee law.

E. This Agreement does not waive, bar, release or affect any claims TDEC may have for damages to natural resources.

F. TDEC shall retain all rights it has pursuant to Section 121(f)(3) of CERCLA, 42 U.S.C. Section 9621(f)(3) and Tennessee law. If TDEC does not exercise its rights under Section 121(f)(3) CERCLA in a timely manner, the response action may proceed.

XXI. STIPULATED PENALTIES

A. In the event that DLA fails to submit a primary document pursuant to the appropriate schedule or deadline in accordance with the requirements of this Agreement, or fails to comply with a term or condition (including any deadlines or schedules for work under this Agreement) which relates to a CERCLA response action, EPA may assess a stipulated penalty against DLA. A stipulated penalty may be assessed in an amount not to exceed $5,000 for the first week (or part thereof), and $10,000 for each additional week (or part thereof) for which a failure set forth in this Section occurs.

B. Upon determining that DLA has failed in a manner set forth in Subparagraph A, EPA shall so notify DLA in writing. If the failure in question is not already subject to dispute resolution at the time such notice is received, DLA shall have thirty (30) days after receipt of the notice to invoke dispute resolution on the question of whether the failure did in fact occur. DLA shall not be liable for the stipulated penalty assessed by EPA if the failure is determined, through the dispute resolution process, not to have occurred. No assessment of a stipulated penalty shall be final until the conclusion of any dispute resolution procedures related to the assessment of the stipulated penalty, if invoked.

C. The annual reports required by Section 120(e)(5) of CERCLA, 42 U.S.C. Section 9620(e) shall include, with respect to

each final assessment of a stipulated penalty against DLA under this Agreement, each of the following:

1. A statement of the facts and circumstances giving rise to the failure;

2. A statement of any administrative or other corrective action taken at the relevant facility or a statement of why such measures were determined to be inappropriate;

3. A statement of any additional action taken by or at the facility to prevent recurrence of the same type of failure; and

4. The total dollar amount of the stipulated penalty assessed for the particular failure.

D. Stipulated penalties assessed pursuant to this Section shall be payable to the Hazardous Substances Response Trust Fund only in the manner and to the extent expressly provided for in Acts authorizing funds for, and appropriations to, the DoD.

E. EPA and TDEC agree, to the extent allowed by law, to share equally any stipulated penalties paid by DLA between the Hazardous Substances Response Trust Fund and the appropriate Tennessee state fund.

F. In no event shall this Section give rise to a stipulated penalty in excess of the amount set forth in Section 109 of CERCLA, 42 U.S.C. §9609.

G. This Section shall not affect DLA's ability to obtain an extension of a deadline or schedule pursuant to Section XXIII (Extensions) of this Agreement.

H. Nothing in this Agreement shall be construed to render any officer or employee of the DoD personally liable for the payment of any stipulated penalty assessed pursuant to this Section.

FINAL PAGE

ADMINISTRATIVE RECORD

FINAL PAGE

FINAL PAGE

ADMINISTRATIVE RECORD

FINAL PAGE