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B-162447 March 8, 1971

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The Honorable George H. Mahon, Chairman Committee on Appropriations House of Representatives

Dear Mr. Chairman:

Reference is made to your letter of December 18, 1970, asking, in effect, whether the Department of Defense has complied with the provisions of Public Law 91-294, approved June 29, 1970, as extended by Public Law 91- 645 approved January 2, 1971, in the three instances described in your letter.

Public Law 91-294, as amended, appropriates, generally, in those instances where the Congress had not yet enacted specific appropriation acts for the various departments for the fiscal year 1971, such amounts as may be necessary for the continuation of certain projects or activities during the fiscal year 1971 until the pertinent annual appropriation act is enacted.

With respect to the amount of fund made available to the Department of Defense during the period involved, section 101 (b) of Public Law 91-294 provided for the appropriation of -

"Such amounts as may be necessary for continuing projects or activities which were conducted in the fiscal year 1970 and are listed in this subsection at a rate of operations not in excess of the current rate or the rate provided for in the budget estimate, whichever is lower, and under the more restrictive authority activities for which provision was made in the Department of defense Appropriation Act, 1970; ***."

The first instance referred to in your letter concerns the Department of the Navy's obligations for two surface effects ships under its appropriation for "Research, Development, Test, and Evaluation" (RDT&E).

For the fiscal year 1971, the Navy included in its request for RDT&E funds the sum of $20 million to continue the development and construction of two surface effects ships. The Senate Committee on Armed Services, however, in considering the Armed Forces Appropriation Authorization Bill, 1971, recommended an allowance of only $10 million for such purpose and such recommendation was adopted by the Senate. The entire amount requested for the surface effects ships was authorized by the House of Representatives and, in the Committee on Conference, the amount reduced by the Senate was restored so that Public Law 91-441, the Armed Forces Appropriation Authorization Act, 1971, approved October 7, 1970, included in the sum authorized for RDT&E the sum of $20 million for the

surface effects ships.

Subsequently, in considering the Department of Defense Appropriation Bill, 1971, the House Committee on Appropriations recommended a $10 million reduction in the $20 million requested for the continuation of the surface effects ships program. The recommendation was adopted by the House on October 8, 1970, and was sustained by the Committee of Conference on December 29, 1970. Consequently, when Public Law 91-668, 854 Stat. 2020, the Department of Defense Appropriated Act, 1971, was approved on January 11, 1971, the amount appropriated for RDT&E, Navy, $2,137,900,000 included the sum of $10 million for the surface effects program.

We have been advised that $7.9 million for the surface effects ships program was included in the fiscal year 1970 appropriation for RDT&E, Navy, and that such amount and an additional amount of $2.3 million of reprogrammed funds were obligated in the fiscal year 1970 for such program for a total of $10.2 million.

Consequently, since it is reported that the Navy obligated $5 million during each of the months of July and August of 1970 for a total of $10 million through December 1970, an amount approximately equal to that obligated for the entire fiscal year 1970, question arises whether the Department of Defense violated the provisions of Public Law 91-294 by incurring obligations "at a rate not in excess of the current rate" as provided in Public Law 91-294.

In our decision of December 6, 1963, B-152554, to the Administrator, National Aeronautics and Space Administration, there was considered a similar question which arose under a similar joint resolution which likewise provided for continuing appropriations which involved the continuation of a project or activity "at a rate for operations not in excess of the current rate or the rate provided for in the budget estimates, whichever is lower ***."

In that case, and as here, the budget estimates exceeded the funds available to the agency for the previous fiscal year. With resect to whether the expenditures made were within the limitations of the joint resolution we stated therein in part, as follows:

"'Rate' has been defined as a price or amount stated or fixed on anything with relation to a standard, a fixed ration, a settled proportion. City of Chicago v. Illinois Commerce Commission, 150 N. E. 2d 776. The language current rate as used in subsection 101(b) might at first glance be viewed to mean the rate of operations for the corresponding month of fiscal year 1963, or as 1/12 of the appropriations for 1963, or the month of June 1963, or some other portion of the appropriations for 1963. The only standard, fixed ratio, or settled proportion provided for therein with which the 'current rate' is to be related is 'the rate provided for in the budget estimate. Since the budget estimate is for a full fiscal year it follows that the 'current rate' may have been intended to mean the rate of operations which was carried on with the appropriations for the entire fiscal year 1963. There is some legislative history of the instant joint resolution to support this view. Therefore while obligations incurred by an agency during any particular month may exceed the June 1963 obligations, 1/12 of obligations incurred for fiscal year 1963, or obligation incurred during some other portion of fiscal year 1963, it does not necessarily follow that there has been a violation of subsection 101(b). Variations in the monthly or quarterly obligations are antideficiency act, section 3679, Revised Statutes, as amended, 31 U. S. C. 665. Any mathematical formula not recognizing such variations in the

many complex governmental programs would not seem practicable. While the legislative intent of the term 'current rate' is not clear, we are inclined to the view that the requirements of subsection 101(b) have been met where an agency can establish that it is operating under a flexible plan that would enable continuation of activities throughout the fiscal year 1964 within the level of the appropriations available during the preceding fiscal year or as provide in the budget estimate, whichever is lower. The guide for agencies restricted to the current rate generally should be the pattern of obligations incurred during the fiscal year 1963. Once the appropriation act has been enacted, expenditures must be charged to the appropriation act has been enacted, expenditures must be charged it the applicable appropriation, as required by section 103 of Pub. L. 88- 55."

Before considering whether the obligations incurred for the surface effects ships program meet the criteria set forth in such earlier decision, we believe it must first be determined whether the surface effects of those terms as used in Public Law 91-294.

The fiscal year appropriations for RDT&E, Navy, have been lump sum appropriations and contain no provision or limitation therein concerning funds for the surface effects ships program or other programs for which budget estimates were submitted. However, it is evident that in determining the amounts of the appropriations the amounts estimated for the program were considered in making such determinations.

With respect to the effect of budget estimates, we held in 17 Comp. Gen 147 (1937) (quoting from the syllabus) that:

"Amount of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted, are not blinding on administrative officers unless carried into the appropriation act."

It would therefore appear unduly restrictive to construe the language of Public Law 91-294 in such a manner as to remove the element of flexibility provided by lump-sum appropriations by requiring that the amounts of the individual items in the budget be controlling.

These resolution providing continuing appropriations for temporary periods prior to enactment of the annual appropriation acts have been used year after year and the language in question has remained essentially the same. The term "projects or activities" has never been construed by prior accounting officers and we are not aware of anything in the legislative histories of such acts indicating any congressional intent as to the meaning of such term. At first glance, it might seem logical to construe the term "projects or activities" as set out in the budget. But this would require a tremendous amount of bookkeeping and would be contrary to the very purpose of subsection (g) of section 3679, Revised Statutes, 31 U. S. C. 665(g) as added by Public Law 863, approved August 1, 1956, 70 Stat. 782.

In any event, we see no basis whatever for construing the term "projects or activities" as applying to line items under the "activities" set out in the budget. Since the surface effects ships program is a equipment for which $375,500,000 was requested for 1971, we cannot conclude that the obligation of $10,000,000 for this program through December, 1970 is a violation of the containing resolution. If in enacting future continuing resolutions it is

intended to control such line items or to control the individual projects and activities set out in the budget, we suggest that such intent be clearly set out in the committee reports on the resolutions.

The two remaining instances described in your letter involve the obligation in fiscal year 1971 of funds that had been provided in the Department of Defense Appropriation Act, 1970, which, by the terms of that act, were available until expended. In other words, the obligations in question were against prior year unobligated funds carried forward into the fiscal year 1971. Since Public Law 91-294 relates only to funds appropriated therein, its provisions do not extend to the obligations questioned in those two instances.

In accordance with your suggestion, we inquired into the manner in which the Department of Defense exercises its authority under continuing resolutions such as Public Law 91-294. The release of programs to the military services is controlled by the office of the Secretary of Defense (OSD). We were advised that while there are no written procedures regarding this matter the following factors are considered by OSD before releasing programs for execution:

1. The sensitivity of Congress to the item.

2. Judgement concerning internal considerations such as whether or not the program is at a stage that warrants further work.

3. Cost increases.

We were also told that if there are major questions within the Department of Defense concerning any program, the program is placed on a deferred list until the matter are resolved. In other cases OSD officials stated that, during periods that continuing resolutions are in effect, they reloaded programs at amounts lower than the budget estimates for the fiscal year.

In additional, Army and Navy officials advised us that in those cases where they were knowledgeable of congressional concern with regard to certain items, they paid particular attention to those items before any action was taken to obligate available funds.

Sincerely yours,

(SIGNED) ELMER B. STAATS Comptroller General of the United States