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DIGEST: Subsection 317(b) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, provides contract authority to the Department of Transportation to obligate funds for the establishment of a bus testing facility. The language used in the provision is virtually identical to the language used by the Congress to create contract authority in section 21 of the Urban Mass Transportation Act of 1964, as amended. The Congress will be required to pass a subsequent appropriation to liquidate any obligation incurred under this authority.

Department of Transportation-- Establishment of Bus Testing Facility:

The General Counsel of the Department of Transportation (DOT) has requested our opinion on whether subsection 317(b) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURA Act) makes funds available to the Department for the establishment of a bus testing facility. As provided in more detail below, we conclude that subsection 317(b) of the STURA Act provides contract authority, which authorizes DOT to obligate $200,000 for fiscal year 1987, and $3,000,000 for fiscal year 1988 for the establishment of a bus testing facility. Subsequent appropriations will be necessary to liquidate the obligations incurred by DOT for the construction of the bus testing facility. This is consistent with the manner in which expenditures have been made from the Mass Transit Account of the Highway Trust Fund in the past.

BACKGROUND

Subsection 317(b) of the STURA Act, Pub. L. No. 100-17, 101 Stat, 132, requires the Secretary of Transportation to establish a facility for the purpose of testing new bus models, as follows:

"(b) Bus Testing Facility.--

"(1) Establishment.-- The Secretary shall establish a facility for testing new bus models for maintainability, reliability, safety, performance, structural integrity, fuel economy, and noise. Such facility shall be established by renovation of a facility constructed with Federal assistance for the purpose of training rail personnel.

"(5) Funding.-- There shall be available to the Secretary out of the Mass Transit Account of the Highway Trust Fund for establishment of the facility under paragraph (1) $200,000 for fiscal year 1987 and $3,000,000 for fiscal year 1988. Funds made available by this paragraph shall remain available until

expended and shall not be subject to any obligation limitation." 101 Stat. 132, 233 (1987).

The General Counsel of DOT interprets these provisions as making appropriations out of the Mass Transit Account to DOT for 1987 and 1988, "thereby allowing the Department of Transportation to enter into obligations without the benefit of further Congressional action."

ANALYSIS

We agree with the General Counsel that subsection 317(b) of the STURA Act does authorize DOT to enter into obligations without the need for a prior appropriation or further authorization from the Congress. However, in our view, the statute provides not an appropriation, but contract authority which, when exercised, creates a binding obligation on the United States. Therefore, the Congress must make subsequent appropriations in order to liquidate the obligations incurred pursuant to this authority.

The General Counsel infers that subsection 317(b) is itself an appropriation by reading the requirement that the Secretary "shall establish" a testing facility in conjunction with the Congress having provided that specified sums of money "shall be available" for establishment of the facility in fiscal years 1987 and 1988. See STURA Act, Sec. 317(b)(1) and (5), 101 Stat. at 233.

If the phrase "shall be available" stood alone, we would interpret the language as creating a full appropriation, i.e., one that permits obligations to be incurred and payments to be made from the Treasury. this instance, however, we must read this language in the context in which projects are normally financed from the Mass Transit Account of the Highway Trust Fund. According to the express language of the provision establishing the Mass Transit Account, amounts in the Trust Fund are available for expenditure "as provided by appropriation Acts." 26 U.S.C. Sec. 9503(e)(3). This quoted language has been interpreted as requiring financing in a three-step process: first, the Congress creates contract authority in an authorization act; second, the Congress imposes an annual limitation on obligations of that contract authority in an appropriations act; and third, the Congress enacts appropriations to liquidate obligations, also in an appropriations act. /1/ The language the Congress has used in the past to create contract authority from the Mass Transit Account is virtually identical to the language it used in subsection 317(b) of the STURA Act. Thus, Section 21 of the Urban Mass Transportation Act of 1964, as amended, provides:

"(a) Sections 9 and 18.-- ...

(2) There shall be available from the Mass Transit Account of the Highway Trust Fund ... $1,097,000,000 for the fiscal year 1987, and $1,000,000,000 for each of fiscal years 1988 through 1991, to remain available until expended.

"(b) Sections 3 and 9B.-- In addition to the amounts set forth in subsection(a)(2), ... there shall be available from the Mass Transit Account however, we must read this language in the context in which projects are normally financed from the Mass Transit Account of the Highway Trust Fund. According to the express language of the provision establishing the Mass Transit Account, amounts in the Trust Fund are available for expenditure "as provided by appropriation Acts." 26 U.S.C. Sec. 9503(e)(3). This quoted language has been interpreted as requiring financing in a three-step process: first, the Congress

creates contract authority in an authorization act; second, the Congress imposes an annual limitation on obligations of that contract authority in an appropriations act; and third, the Congress enacts appropriations to liquidate obligations, also in an appropriations act. /1/

The language the Congress has used in the past to create contract authority from the Mass Transit Account is virtually identical to the language it used in subsection 317(b) of the STURA Act. Thus, Section 21 of the Urban Mass Transportation Act of 1964, as amended, provides:

"(a) Sections 9 and 18.-- ... (2) There shall be available from the Mass Transit Account of the Highway Trust Fund ... $1,097,000,000 for the fiscal year 1987, and $1,000,000,000 for each of fiscal years 1988 through 1991, to remain available until expended,

"(b) Sections 3 and 9B.-- In addition to the amounts set forth in subsection(a)(2), ... there shall be available from the Mass Transit Account of the Highway Trust Fund for each of fiscal years 1988 through 1991--

"(1) $200,000,000 for fiscal year 1988;

"(2) $250,000,000 for fiscal year 1989;

"(3) $300,000,000 for fiscal year 1990; and

"(4) $400,000,000 for fiscal year 1991; to remain available until expended." Pub. L. No. 100-17, Sec. 328, 101 Stat. 132, 238.

That these provisions in section 21 create contract authority rather than appropriations is clear from the language of paragraph 21(c)(2), the legislative history of the provision, and the subsequent treatment of these projects referred to above. /2/

Since, as we have said, the language of subsection 317(b) of the STURA Act is virtually identical to the language that the Congress has used to create contract authority in section 21, we must presume that subsection 317(b) also creates contract authority, rather than a direct appropriation. There is nothing in the legislative history of 317(b) which would rebut our presumption, nor have the General Counsel's arguments convinced us that our presumption is incorrect.

First, the General Counsel argues that use of the phrase "made available by this paragraph" in subsection 317(b) is "totally inconsistent" with the contract authority language in section 21, and therefore must be indicative of an appropriation. We disagree. As we demonstrated above, the language of subsection 317(b) is virtually identical to section 21.

Second, the General Counsel indicates that it "seems unlikely" that Congress would merely authorize the obligation of funds for fiscal year 1987 for the bus testing facility "given the fact that the Department's fiscal year 1987 appropriation was enacted ... before the enactment of the STURA Act." We see no inconsistency. The phrase "available until expended" refers to the length of time that get authority, including contract authority, remains available for obligation for a given purpose. Although the budget authority for the bus testing facility was enacted late in the 1987 fiscal year, by expressly providing "no year" availability, there was no danger that it would lapse before

it could be obligated for the desired purpose. Funds to liquidate this obligation, of course, need not be appropriated in fiscal year 1987.

There is one further indication in the language of section 317(b) that supports our view that the authority provided therein was contract authority and not an appropriation. There is an explicit reference to the fact that the "funds made available ... shall not be subject to any obligation limitation." As we indicated above, it is the normal practice of the Congress to place obligation limitations on contract authority from the Mass Transit Account. If section 317(b) were itself an appropriation, this provision would be mere surplusage.

Finally, we are enclosing a copy of a letter our General Counsel sent to the General Counsel of the Senate Committee on Appropriations on September 17, 1987. It pertains to section 338 of the STURA Act rather than section 317(b), but the authority provided was also regarded as contract authority. It contains a discussion of the effect of such authority on the discretion of the Congress to deny or limit liquidating appropriations. He said:

"If the Congress refuses to appropriate sufficient funds from the Trust Fund to cover these costs, I think that the Government would be liable for breach of its contractual obligation to the District. ... I do not think your Committee and the Congress as a whole has a realistic option to refuse to make the necessary funds available."

/1/ For example, in 1983, Congress provided contract authority to obligate funds from the Mass Transit Account for fiscal years 1983 through 1986. 49 U.S.C. App. Secs. 1617(a)(2), as amended by the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424 Sec. 302, 96 Stat. 2140. Congress subsequently enacted limitations on the obligation of this contract authority and appropriations to liquidate obligations incurred under this authority. See Pub. L. No. 98-78, 97 Stat. 466 (FY 1984 appropriation); Pub. L. No. 98-473, 98 Stat. 1957 (FY 1985 appropriation); Pub. L. No. 99-190, 99 Stat. 1281 (FY 1986 appropriation); H. Rep. No. 976, 99th Cong. 2nd Sess. 24, incorporated by reference into the continuing resolution for fiscal year 1987, Pub. L. No. 99-591, 100 Stat. 3341-308. In April of 1987, Congress provided additional contract authority to obligate funds from the Mass Transit Account for fiscal years 1987 through 1991. Pub. L. No. 100-17 Secs. 317 and 328, 101 Stat. 233 and 238.

/2/ Paragraph 21(c)(2) provides that approval of a grant under the above- quoted authority "shall be deemed a contractual obligation of the United States." In addition, the legislative history of these provisions indicates that they were intended as contract authority. H. Rep. No. 27, 1OOth Cong. 1st Sess. 215.