Text as published on gao.gov, https://www.gao.gov/products/b-230110, archived 2025-02-14. GAO published no original file for this decision. Rendered by Comptroller Desk.

[Comments on Appropriations Restrictions on Electricity Procurement]

Number: B-230110

Date: 1988-04-11

B-230110, Apr 11, 1988

APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Purpose availability - Contracts DIGEST: An analysis of the scope and effect of section 8093 of the Department of Defense Appropriations Act, 1988, Pub. L. No. 100-202, Sec. 101(b) shows that it is a government-wide permanent restriction on using appropriated funds to procure electricity competitively. A comparable provision in section 509 of the Treasury, Postal Service, and General Government Appropriations Act, 1988, Pub. L. No. 100-202, Sec. 101(m), is considerably more limited in its applicability.

The Honorable John D. Dingell Chairman, Subcomittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives:

Your letter of January 4, 1988 asked eleven questions concerning the interpretation of two appropriations restrictions on the government's procurement of electricity, found in section 8093 of the Department of Defense and in section 509 of the Treasury, Postal Service, and General Government Appropriations Acts for 1988. These Acts are incorporated in the Continuing Resolution for 1988, Pub. L. No. 100-202, at sections 101(b) and (m), respectively.

Because of the time constraints on our response and because you asked the same questions of the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC), agencies charged with administering federal energy policy, we did not seek the views of those agencies.

BACKGROUND

On May 7, 1986, the General Services Administration (GSA) proposed an amendment to the Federal Acquisition Regulations that would have required competitive procurement procedures to be applied to the government's purchase of electricity. 51 Fed. Reg. 16988-16991. Congress sought to restrain the move toward competitive procurement of utility services in Fiscal Year 1987 by prohibiting implementation of the proposed regulation. Pub. L. No. 99-591, Sec. 101(c), Department of Defense Appropriations Act, 1987, Sec. 9111, 100 Stat. 3341-120; and Id. Sec. lOl(m), the Treasury, Postal Service, and General Government Appropriations Act, 1987, Sec. 620, 100 Stat. 3341-333 (complete text of both sections is reproduced in the Attachment to this letter).

As a result of the Fiscal Year 1987 provisions, GSA indefinitely suspended further action on the regulation. Congress again took up the issue in the Fiscal Year 1988 Continuing Resolution. Two separate provisions were ultimately

included in Public Law 100-202; section 8093 of the Department of Defense Appropriations Act, 1988, Pub. L. No. 100 202, Sec. 101(b), 101 Stat. 1379-43, 1379-79 (section 8093); and section 509 of the Treasury, Postal Service, and General Government Appropriations Act, 1988, Pub. L. No. 100-202, Sec. 101(m), 101 Stat. 1329-391, 1329-416 (section 509). The full text of both provisions is reproduced in the Attachment.

APPROPRIATIONS QUESTIONS

Question 1

"In the case of both provisions, the term "Act" is used. Which Act does this term refer to in each provision? Does the term "any other Act" in section 8093 refer to any laws other than appropriation Acts applicable to the Defense Department?"

In the context of a Continuing Resolution, which consolidates in one Joint Resolution full year appropriations for what would have otherwise been enacted in several separate appropriation acts, we think a provision using the term "this Act" generally should be interpreted as referring only to the individual appropriation act in which the provision is found, since in most cases such language will have been included in the particular appropriation act in which it appears before incorporation into the Continuing Resolution. Of course, where a broader meaning is clearly indicated, such meaning will govern. Accordingly, in the context of section 509, "this Act" means the Treasury, Postal Service, and General Government Appropriations Act, 1988. As we decided in 65 Comp.Gen. 588 (1986), the term "this or any other Act" in section 8093 expands the prohibition to cover all other appropriations acts enacted during the fiscal year.

Question 2

"In the case of section 509, what "funds" are referenced? What Federal agencies are affected by this provision?"

The scope of the provision, "none of the funds appropriated or made available by this Act ...," encompasses all the funds appropriated in the Treasury, Postal Service, and General Government Appropriations Act, 1988. The funds in question are the funds actually appropriated or made available (i.e. authorized for transfer between appropriation accounts or made available from a revolving fund) by that Act. Directly affected are all the agencies whose funding is provided through the Treasury, Postal Service, and General Government Appropriations Act. Further, since the General Services Administration (GSA) is one of the independent agencies whose appropriations are provided in that Act, all the federal agencies for which GSA provides electric utility service are affected indirectly./1/

Question 3

"Taking into consideration earlier General Accounting Office (GAO) decisions, are sections 509 and 8093 limited to one fiscal year?"

This question asks whether the provisions constitute permanent legislation. It has been the longstanding position of this Office that a provision contained in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of

Congress. 65 Comp.Gen. 588 (1986); 10 Comp.Gen. 120 (1930). The principal means of establishing permanence is to include "words of futurity" in the statutory language. Other circumstances in which a provision in an appropriating act might be construed to be permanent occur when the provision is general in nature and unrelated to the substance of the appropriation act in which it is included, or when the provision would be rendered meaningless if not construed to be permanent. See, e.g., 62 Comp.Gen. 54 (1982); 36 Comp.Gen. 424 (1956).

Applying these rules to section 509, it is apparent that it is an example of a 1-year restriction. Section 509 restricts the expenditure of funds, and so it is obviously related to the objects of the appropriation act. 32 Comp.Gen. 11 (1952). It is effective as a 1 year moratorium on competitive procurement of electricity, and therefore is not meaningless if temporary. 65 Comp.Gen. 588 (1986). Since there are no "words of futurity" in the provision, it can only be construed as limited to Fiscal Year 1988.

Section 8093, on the other hand, appears to us to be permanent. decided in 65 Comp.Gen. 588 that, standing alone, the use of the expression "no funds appropriated by this or any other Act" does not create permanent law. The fact that section 8093 includes the additional words "or made available" is of no material consequence to the analysis of permanence under that decision. However, the effect of the phrase, "with respect to any fiscal year" is to make the restriction permanent.

The applicable rule is that the presumption that the provisions in an appropriation act are of limited duration may be overcome by the use of "words of futurity." Words of futurity include expressions such as "henceforth" "hereafter" or "after the date of enactment of this Act." Although we have never had occasion to comment on it before, the forward- looking effect of the phrase "with respect to any fiscal year" is clear on its face. /2/

Question 4

"In the case of section 8093, what "funds" are referenced?" The restriction in section 8093 applies to all funds "appropriated or made available" in Fiscal Year 1988, including the funds similarly restricted by section 509. In 65 Comp.Gen. 588, we found that the obvious effect of a restriction applied to funds provided in "this or any other Act" was to extend the restriction to all the other appropriation acts of that fiscal year. we also reasoned that such language extended the restriction to "carry-over" funds in the account that would have been available during the fiscal year for the prohibited purpose, and to "funds transferred from other appropriation accounts under existing authority or additional funds made available" during the fiscal year.

In addition, we have taken the position that user fees, offsetting collections, and other funds which an agency may be authorized to collect, retain and apply to authorized purposes also constitute "appropriated funds" subject to any restrictions in appropriations acts. See, e.g., 63 Comp.Gen. 285 (1984) and B-193573, December 19, 1979. Finally, considering that the provision is permanent, it would also apply to any funds provided by future appropriation acts in the absence of an express exemption incorporated in the appropriations act itself.

Question 5

"Does the term "any Department, agency or instrumentality of the United States' encompass all Federal entities, including the Tennessee Valley Authority, the power marketing agencies, the Federal Prison System, the Coast Guard, the National Park Service, the General Services Administration, Conrail, the space agency, the weather service, the defense agencies, and governmental corporations? Are the funds of these agencies affected by these sections? Please explain."

The fifth question asks what federal entities are covered by the restriction in section 8093, since that section applies to the purchase of electricity by "any Department, agency, or instrumentality of the United States." Since all but one of the entities mentioned in the question are either agencies or instrumentalities of the United States, any purchase with appropriated funds made by them or by other entities which similarly are Departments, agencies or instrumentalities is covered by the restriction.

By its terms, the restriction would not extend to an agency's contractors or grantees, nor would it bind a purchaser if any of these entities were to be privatized in the future. Similarly, the restriction does not apply to Conrail, which has already been sold and received no funds under the 1988 Continuing Resolution.

REMAINING QUESTIONS

The remaining six questions are largely concerned with the impact of the two provisions. You have asked the Department of Energy and the Federal Energy Regulatory Commission (FERC) for their views on these questions and we believe the two agencies are in a better position than we are to answer them. Accordingly, we have not responded to questions 6 through 11 on the assumption that the Department of Energy and FERC will provide the information you require.

We trust the foregoing information is useful to you. Under our usual procedures, this opinion will be available to the public 30 days from its date.

ATTACHMENT

FULL TEXT OF RELEVANT STATUTORY MATERIALS

1987 Appropriation Restriction

The Treasury, Postal Service, and General Government Appropriations Act in section lOl(m) of Pubiic Law 99-591, contained the following language in Section 620:

"None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Federal Register 16988-16991), or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas, or steam utility services acquired by the Federal Government."

100 Stat. 1783-309, 1783-333.

A corresponding provision in the Department of Defense Appropriations Act, 1987 (section 9111) provided as follows:

"None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or section 8.304-91 of the Air Force FAR Supplement issued on June 24, 1985."

100 Stat. 1783-81, 1783-120.

As a result of these restrictions, the final publication of the proposed regulation was suspended indefinitely. Since the restriction was limited to Fiscal Year 1987, however, the proposed regulation could have been reinstated beginning on October 1, 1987. To counter that, new restrictions were added to the 1988 Continuing Resolution.

FY 1988 Appropriation Restrictions

The Continuing Resolution for Fiscal Year 1988 contains two separate and overlapping provisions concerning the purchase of electricity. They are quoted in full below:

"None of the funds appropriated or made available by this Act shall be used to competitively procure electric utility service, except where such procurement is expressly authorized by the Federal Power Act or by State law or regulation."

Section 509 of the Treasury, Postal Service, and General Government Appropriations Act, 1988, Pub. L. No. 100-202, Sec. 101(m), 101 Stat. 1379 -416.

"None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements; Provided, That nothing in this section shall preclude the head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287; nor shall it preclude the Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 or from purchasing electricity from any provider when the utility or utilities having applicable stateapproved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense." Section 8093 of the Department of Defense Appropriation Act, 1988, Pub. L. No. 100 -202 Sec. lOl(b), 101 Stat. 1379-79.

Conference Report

The Joint Explanatory Statement in the Conference Report contains the following information about Sec. 8093:

"The conferees agree to the Senate language concerning competitive acquisition of utilities. This action is not intended to affect transfers of electricity to federal agencies, departments or instrumentalities from federal power marketing agencies or the Tennessee Valley Authority. Such transfers do not constitute "purchases" for purposes of this section, since they represent the federal government in effect selling to itself."

H. R. Rep. No. 498, 100th Cong., 1st Sess., reprinted in, 133 Cong. Rec. H12392, 12609 (daily ed., Dec. 21, 1987).

/1/ The restriction would also apply to the Federal Buildings Fund. Although no monies are appropriated to the fund by the Treasury, Postal Service, and General Government Appropriations Act, the Act releases the money in the Fund for specific purposes.

/2/ We also looked at the legislative history of the provision, but could find nothing relating to the permanence of the statutory language.