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B-241514.2 February 5, 1991

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The President of the Senate and the Speaker of the House of Representatives

This letter reports deferrals of budget authority in military construction programs that should have been, but were not, reported to the Congress by the President pursuant to the Impoundment Control Act of 1974.

Section 1015(a) of the Impoundment Control Act, 2 U.S.C. Sec. 686(a), requires the Comptroller General to report to the Congress whenever he finds that any officer or employee of the United States has ordered, permitted, or approved a reserve of budget authority, and the President has failed to transmit a special impoundment message with respect to such reserves.

On January 24, 1990, a moratorium on military construction was imposed by Secretary of Defense Richard Cheney and extended several times through November 15, 1990. On November 15, 1990, Secretary Cheney extended the moratorium until April 16, 1991. The order states that:

". . . no military construction contracts financed by military construction appropriations may be awarded, and no options under such existing contracts may be exercised, except for:

(1) construction in or around the Arabian peninsula in support of Operation DESERT SHIELD;

(2) architectural and engineering design services for locations that are not in Europe and are not military installations that are the object of a net reduction of personnel under the Base Closure and Realignment Act (Public Law 100-526); and

(3) construction with which the United States has a legal obligation to proceed under a statute, treaty, international agreement or court decree."

In addition, the Deputy Secretary of Defense may "grant exceptions from the prohibition on awarding contracts and exercising options for construction projects needed to meet urgent requirements."

On November 5, 1990, the President signed Public Law 101-519, making appropriations for Military Construction for fiscal year 1991. The law appropriates $8,362,171,000 in multi-year and no-year funds. /1/ Consequently, Secretary Cheney's order extending the moratorium includes, with the exceptions noted therein, all funds appropriated in Public Law 101-519.

Under the Impoundment Control Act (Act), a deferral of budget authority includes:

"(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

"(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority . . . ."

2 U.S.C. Sec. 682(1).

The Act permits deferrals only:

"(1) to provide for contingencies;

"(2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

"(3) as specifically provided by law."

2 U.S.C. Sec. 684(b). Deferrals for any other purpose are not authorized. Id.

The Department's position, reflected in Department correspondence to this Office and Congressional testimony, is that it does not view the moratorium as an impoundment. See Hearings on Military Construction Appropriations, Fiscal Year 1991, Before a Subcommittee on Military Construction, House of Representatives, 101st Cong., 2nd Sess. 111 (1990). According to the Department, the Military Construction funds subject to the moratorium have been apportioned, and are therefore available for obligation. The Department regards the delay in obligating the funds as "programmatic" and related to efficient program execution.

We do not agree with the Department's position that the withholding is not an impoundment, but a programmatic delay. First, the fact that funds have been apportioned to an agency and allotted to local bases does not preclude the existence of an impoundment of budget authority. It is possible for an agency to effect an impoundment, without actually holding funds in a reserve, after funds are apportioned to it by OMB. See B-224882, Aug. 3, 1987. The Impoundment Control Act provisions regarding deferrals applies not only to the President and the Director of OMB but also to the head of any department or agency of the United States and any officer or employee. 2 U.S.C. Sec. 684(a). Therefore, if funds are apportioned but inaction by the head of a department effectively precludes the obligation or expenditure of budget authority, such inaction may constitute an impoundment. Further, administrative inaction coupled with an intention not to obligate falls squarely within the provisions of the Impoundment Control Act. 2 U.S.C. Sec. 682(1)(B). Although in this case, the funds have been apportioned and allotted, such administrative action does not alter the legal significance of the Secretary's overriding order imposing a moratorium on the use or obligation of apportioned funds.

Secondly, the withholding of military construction budget authority does not constitute a "programmatic" delay. Our decisions distinguish between programmatic withholdings outside the reach of the Impoundment Control Act and withholdings of budget authority that qualify as deferrals subject to the Act's

requirements. Programmatic delays typically occur when an agency is taking necessary steps to implement a program even if funds temporarily go unobligated. B-203057, Sept. 15, 1981. Thus, a characterization of a delay as "programmatic" presupposes that an agency is making reasonable efforts to obligate the funds and that the delay is, even with such efforts, unavoidable. B-96983, B-225110, Sept. 3, 1987. For example, delays due to administrative actions resulting from uncertainty as to the amount of funds that ultimately will be or are appropriated for a particular program could constitute a programmatic delay. B-207374, July 20, 1982; GAO/OGC-90-4, B-237297.3, Mar. 6, 1990.

Delaying the award of grants, and thus the obligation of funds, pending issuance of grant regulations necessary to implement the program can also be programmatic. B-171630, May 10, 1976. Other examples of programmatic delays include a delay in obligating funds due to a low number of loan applications, B-115398, Sept. 28, 1976, or a delay in obligating funds occasioned by an agency's failure to receive contract proposals for a timely obligation of funds. B-115398, Feb. 6, 1978.

The military construction moratorium bears no resemblance to such "programmatic" delays. The moratorium action falls squarely into the category of a deferral authorized by the Impoundment Control Act to "achieve savings made possible by or through changes in requirement or greater efficiency of operations," rather than into a category for programmatic delays. 2 U.S.C. Sec. 684(b)(2). /2/

Thus, we conclude that the Secretary's order relating to funds appropriated for fiscal year 1991 is an action which delays and precludes for the duration of the order the obligation of budget authority for military construction purposes. Such a deferral is reportable under the Impoundment Control Act.

In accordance with section 1015(a) of the Impoundment Control Act, we are reporting to the Congress the withholding of the budget authority appropriated by Public Law 101-519.

Milton J. Socolar Acing Comptroller General of the United States

1. On June 28, 1990, our Office reported Secretary Cheney's construction freeze up to that time as an unreported deferral. GAO/OGC-90-5. Section 125 of the fiscal year 1991 Military Construction Appropriations Act disapproves the deferral reported in our message. To date, however, DoD has not released the funds. We informally understand that the Department anticipates releasing such funds after it submits its recommendations concerning base closures and realignments to the Base Closure Commission statutorily scheduled for April 15, 1991. Pub. L. No. 101-510, Sec. 2903(c), __ Stat.__(1990).

2. Moreover, budget authority for projects proposed for closure or realignment under the provisions of Public Law 101510 could be reported as deferrals "specifically provided by law" under the Impoundment Control Act. 2 U.S.C. Sec. 684(b)(3).