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Obligation of Funds Appropriated for "International Organizations and Programs", B-290659, July 24, 2002

Number: B-290659

Date: 2002-07-24

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The Honorable Barbara Boxer United States Senator Hart Senate Office Building Suite 112 Washington, D.C. 20510-0505

Dear Senator Boxer:

This responds to your letter dated June 3, 2002, asking whether the Department of State has impounded, and failed to so report, $34 million of a fiscal year 2002 lump sum appropriation for "International Organizations and Programs." The State Department was authorized to make up to $34 million of that lump sum available for the United Nations Population Fund (UNFPA), but only after ensuring that UNFPA practices satisfied three statutory conditions. Pub. L. No. 107-115, Sec. 576, 115 Stat. 2168 (January 10, 2002).

The Office of Management and Budget has apportioned the funds for the "International Organizations and Programs" appropriation for the fourth quarter, but the State Department has not yet obligated funds for UNFPA. While the State Department stated it has decided not to fund UNFPA for program-related reasons, we find the delay does not constitute an impoundment under the Impoundment Control Act, 2 U.S.C. Sec. 682. The State Department must, however, make the funds available for obligation to other programs financed by the "International Organizations and Programs" lump sum appropriation. A detailed analysis follows.

THE UNFPA APPROPRIATION

The Foreign Operations Appropriations Act, Fiscal Year 2002, Pub. L. No. 107-115, Title IV, 115 Stat. 2138 (January 10, 2002), contained a lump sum appropriation of $208,500,000 for the State Department for "International Organizations and Programs." Section 576 of the Act provided that "not more than" $34 million of the amounts made available under "International Organizations and Programs" for fiscal year 2002 shall be made available for the United Nations Population Fund (UNFPA). Pub. L. No. 107-115, 115 Stat. 2168. The United States contribution to the UNFPA is subject to the following conditions:

"(c) CONDITIONS ON AVAILABILITY OF FUNDS.-Amounts made available under "International Organizations and Programs" for fiscal year 2002 for the UNFPA may not be made available to UNFPA unless -

(1) the UNFPA maintains amounts made available to the UNFPA under this section in an account separate from other accounts of the UNFPA;

(2) the UNFPA does not commingle amounts made available to the UNFPA under this section with other sums; and

(3) the UNFPA does not fund abortions."

Pub. L. No. 107-115, Sec. 576(c), 115 Stat. 2168.

The Conference Report accompanying the legislation states that the managers "recognize and support the family planning/reproductive health activities" conducted by UNFPA, and "understand that a portion of the United States contribution to UNFPA will be used for HIV/AIDS activities." The report also recognizes that the United States contribution to the UNFPA is subject to a number of conditions regarding UNFPA activities. H.R. Conf. Rep. No. 107-345, Title V, at 93 (December 19, 2001).

DISCUSSION

To date the Administration has not released any fiscal year 2002 "International Organizations and Programs" appropriations to the UNFPA. As part of the President's fiscal year 2003 budget request, the State Department included a statement entitled "Summary and Highlights: International Affairs Function 150." On page 74 of this statement, the State Department shows $34 million of this appropriation as "Reserved - To Be Allocated."

In light of this, we asked the State Department for its legal justification on why the delay in releasing the $34 million and the designation of those funds as "Reserved" should not be reported as an impoundment of budget authority under the Impoundment Control Act of 1974, 2 U.S.C. Sec. 684. Letter from Susan Poling, Managing Associate General Counsel, GAO, to the Honorable Colin L. Powell, Secretary of State, June 14, 2002. In the State Department's response, dated June 28, 2002, it noted that it received its final apportionment for "International Organizations and Programs" from the Office of Management and Budget on April 16, 2002, and it included a copy of the SF-132 Apportionment Schedule. The Apportionment Schedule shows $34 million apportioned as "Category A" resources in the fourth quarter, which, according to the State Department, was intended to address possible UNFPA funding. In discussions with a State Department official, we were advised that the State Department delayed release of the funds pending analysis of the report of a State Department team reviewing UNFPA's involvement in Chinese family planning practices, including the funding of abortions. Since one of the conditions on availability of the funds, quoted in Sec. 576(c)(3) above, is that the UNFPA does not fund abortions, the State Department indicated that the results of this study would feed into any decision to release the funds. Subsequently, the State Department also cited to the Kemp-Kasten amendment (section 518 of Pub. L. No. 107-115), which has been in every foreign operations appropriation act since 1985. This provision specifically states that no appropriated funds may be obligated or expended for any country or organization which, as determined by the President, supports or participates in the management of a program of coercive abortions and involuntary sterilizations.

Section 1011(1) of the Impoundment Control Act, 2 U.S.C. Sec. 682(1), defines "deferral of budget authority" to include:

"(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 ..."

A delay in obligating funds caused by uncertainty as to whether the conditions for funding a program have been met does not by itself constitute a deferral within the meaning of the Impoundment Control Act. The reason for a delay in obligating, not the delay itself, is the key to determining if the requirements of the Act apply. Our decisions distinguish between programmatic withholdings outside of the reach of the Impoundment Control Act and withholdings of budget authority that qualify as impoundments 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. See B-171630, May 10, 1976 (delay of grant awards pending issuance of implementing regulations is a programmatic delay); cf. B-241514.2, February 5, 1991 (withholding of military construction funds is an impoundment, not a programmatic delay, because Department of Defense withheld funds to improve program efficiency, not because of an unavoidable delay, and did not take necessary steps to implement the program while funds were temporarily unobligated). Thus, the Act may not apply to a delay in obligating funds due to program-related factors. B-207374, July 20, 1982; B-205053, May 17, 1982. Since the State Department delayed obligating funds because of uncertainty as to whether the statutory conditions were met, the delay does not constitute an impoundment.

On July 22, the State Department released a press statement stating that "the $34 million that we have for the U.N. Population Fund, with the approval of Congress, will be spent on population programs under USAID's Child Survival and Health Program Fund." The statement continued that "[a]fter careful consideration of the law and all the information that is available, including the report from the team that went to China in May, we came to the conclusion the U.N. Population Fund monies go to Chinese agencies that carry out coercive programs." Although this statement indicates that the $34 million will be made available for obligation, the question remaining is whether the funds may be made available for purposes other than UNFPA.

The Foreign Operations Appropriations Act provided the funds for UNFPA as part of the lump sum for "International Organizations and Programs." Limiting language, such as the phrase, "not more than" $34 million, found in the "International Organizations and Programs" appropriation, sets a maximum amount available for a particular purpose. 64 Comp. Gen. 263 (1985)("not more than" or "not to exceed" language sets the maximum amount available). Legislative language such as "not more than" or "not to exceed" does not require an agency to spend the amount on the object specified. Cf. Brown v. Ruckelshaus, 364 F. Supp. 258, 266 (C.D. Cal. 1973) (interpreting authorizing language "not to exceed" as connoting limitation, not disbursement). When Congress wishes to specify a minimum for the particular object, it may include language such as "not less than." B-131935, March 17, 1986. The "International Organizations and Programs" appropriation does not include this language. Consequently, while the appropriation limits the State Department's use of the lump sum appropriated for "International Organizations and Programs" for UNFPA to no more than $34 million, it does not require by law that any amounts be used for UNFPA. Now that the State Department has determined that the conditions for using funds for UNFPA have not been met, it must make the funds available for obligation to other programs financed by the "International Organizations and Programs" lump

sum appropriation. /1/ In these circumstances, if it does not make the funds available for other "International Organizations and Programs" purposes, the State Department must report an impoundment.

Whenever an agency withholds fiscal year funds from obligation, it must release the funds with sufficient time remaining in the fiscal year to obligate them before the end of the fiscal year. See B-237297.3, March 6, 1990. The "International Organizations and Programs" appropriation is fiscal year money, set to expire on September 30, 2002. In light of the July 22 State Department press statement, it appears that the State Department will have sufficient time in the fourth quarter to obligate the $34 million at issue.

CONCLUSION

In sum, while we conclude that there is no current impoundment of the fiscal year 2002 funds appropriated for UNFPA, we will continue to monitor this situation to ensure that any impoundment that might occur is timely reported.

If you have any questions, please contact Susan Poling, Managing Associate General Counsel, or Thomas Armstrong, Assistant General Counsel, at 202-512-5644. We are sending copies of this letter to the Secretary of State and interested congressional committees. The letter will also be available on GAO's home page at http://www.gao.gov .

Sincerely yours,

Anthony Gamboa General Counsel

cc: The Honorable Colin Powell, Secretary of State

1. Currently, up to $15,500,000 is available to reimburse United States government agencies for the cost of individuals assigned to or contracted by the United States Agency for International Development for the purpose of carrying out activities under the heading of "Child Survival and Health Programs Fund" in the 2002 "International Organizations and Programs" lump sum appropriation.