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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Forest Service—Apportionment Limitation for Aviation Resources

File: B-310108

Date: February 6, 2008

DIGEST

The Forest Service violated the Antideficiency Act, 31 U.S.C. § 1517, when it exceeded an apportionment limitation of $100 million for aviation resources to be used for forest fire suppression activities. The emergency exception to the Antideficiency Act is not applicable because the Forest Service had received an appropriation that was sufficient for these activities; the need for emergency funding was based on the apportionment limitation, which was well below the amount appropriated.

DECISION

The Forest Service has requested our decision regarding its obligation of fiscal year 2006 funds for wildland fire suppression activities. Letter from Hank Kashdan, Deputy Chief for Business Operations, Forest Service, U.S. Department of Agriculture, to David M. Walker, Comptroller General of the United States, Aug. 20, 2007 (Request Letter). This decision addresses whether the Forest Service violated the Antideficiency Act when it incurred obligations for the acquisition of aviation resources in excess of a $100 million limitation contained in an apportionment schedule footnote.

Our practice when rendering decisions is to obtain a factual record from the relevant federal agency and, as appropriate, other interested parties, and to elicit the legal position, if any, of the agency and other interested parties on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this instance, the request letter included, as an attachment, a May 2007 memorandum containing the views of the Office of the General Counsel, U.S. Department of Agriculture (USDA). Memorandum from L. Benjamin Young, Jr., Assistant General Counsel, General Law Division, to J. Lenise Lago, Acting Director, Program and Budget Analysis, Forest Service (USDA

Legal Opinion). We obtained relevant documents from the Forest Service, including an August 25, 2006, request for a legal opinion from USDA OGC (Request for USDA Legal Opinion) and the apportionment and reapportionment schedules for the wildland fire management account for fiscal year 2006. In addition, we engaged in a telephone conversation with Forest Service officials regarding the apportionment footnote and the agency's obligations of funds for aviation resources. Telephone conversation between Lenise Lago, Director, Program and Budget Analysis, Forest Service; Ron Ketter, Director, Strategic Planning and Performance Accountability, Forest Service; and Richard Burkard, Senior Attorney, GAO, Sept. 13, 2007 (Telephone conversation of September 13). We also spoke with OMB staff about the request.

As explained below, the Forest Service violated the Antideficiency Act when it exceeded the apportionment limitation. The Forest Service did not avail itself of the applicable expedited process for seeking "emergency" reapportionments. However, once the Forest Service was aware of the excess obligation, it acted quickly to correct the violation by promptly seeking and receiving an increased apportionment.

BACKGROUND

Under Title III of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, 199 Stat. 499 (Aug. 2, 2005), the Forest Service received an appropriation of $1,779,395,000, to remain available until expended, for wildland fire management. The appropriation provided funds for a number of activities including emergency fire suppression on or adjacent to National Forest System lands. The law did not specifically limit Forest Service spending on the acquisition of aviation resources for wildland fire suppression. USDA Legal Opinion, at 2.

On September 30, 2005, the Office of Management and Budget (OMB) apportioned the wildland fire management funds among the four quarters of fiscal year 2006, ranging from $410 million to approximately $435 million per quarter, with an additional $500 million apportioned for the fourth quarter. SF 132 *Apportionment and Reapportionment Schedule*, Sept. 30, 2005. The apportionment schedule contained a footnote, inserted next to each quarterly dollar amount, stating that "[n]ot more than $100,000,000 of suppression funds is available for acquisition of aviation resources . . . ." *Id.* The footnote also contained a minimum funding amount "for all quarters" for preparedness and a separate amount for regular suppression operations. While the schedule on its face is not entirely clear, the Forest Service understood the $100 million limitation as applying to the four quarters combined (that is, to the year), not each quarter.

Forest Service officials considered $100 million to be insufficient to acquire the aviation resources necessary for the fiscal year 2006 fire season. Request Letter, at 2. Thus, in October 2005, the agency submitted a briefing paper and a request for reapportionment to OMB, stating among other things, that by limiting aviation

expenditures to $100 million, OMB would reduce fire suppression capability by 50 to 75 percent. *See* USDA Legal Opinion, at 2. The Forest Service states that in fiscal year 2005, for example, it spent $180 million on such acquisitions. *Id.* In December 2005, OMB acted on the request by revising the quarterly apportionments, but retained the $100 million limitation for acquisition of aviation resources. SF 132 *Apportionment and Reapportionment Schedule*, Dec. 14, 2005. After that, no changes to the apportionment schedule were requested or made until June 2006.

Beginning in June 2006, there were a series of reapportionments of wildland fire management funds, but it does not appear that the two agencies directly addressed the funding for aviation resources until after the Forest Service had already overobligated the amounts that OMB had apportioned for that purpose.[1] On June 9, 2006, the Forest Service submitted a request for reapportionment seeking an increase in the third quarter overall funding level. *See* SF 132 *Apportionment and Reapportionment Schedule*, June 15, 2006. In the "Agency Request" column of the schedule submitted by the Forest Service, the Forest Service entered new dollar amounts for the third and fourth quarters. Next to the dollar amount for each quarter, the Forest Service request included a footnote, the text of which contained the $100 million limitation for aviation resources.[2] On June 15, the OMB approving official signed the new apportionment schedule, inserting a new, but different dollar amount for the third quarter in the "Action by OMB" column. *Id.* However, the "Action by OMB" column did not include a footnote containing the aviation resources limitation. *Id.* OMB offered no explanation for eliminating the footnote. Nevertheless, as of June 15, OMB, apparently on its own initiative, had removed any limitation on the amount of funds available for the acquisition of aviation resources. The Forest Service states that by the end of June, it had obligated $81 million on aviation resources for the fiscal year. Request for USDA Legal Opinion, at 1.

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[1] Apportionment and reapportionment requests are submitted by agencies to OMB using the SF 132 *Apportionment and Reapportionment Schedule*. This schedule contains an "Agency Request" column and an "Action by OMB" column. Agencies complete the "Agency Request" column by entering the dollar amount they are requesting based on their financial plan, along with supporting data. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, §§ 120.22, 120.23, 120.25, and 120.27 (July 2, 2007). OMB then enters in the "Action by OMB" column the amount requested if it is approving the request or a different amount if it is not. OMB indicates its approval of apportioned amounts in the "Action by OMB" column of an apportionment by signing the "Apportioned" line at the bottom of the schedule. OMB Cir. No. A-11, at §120.36.

[2] The text of the footnote was modified, presumably by the Forest Service, to remove a reporting requirement, not at issue here, which OMB had imposed as a condition for the release of funds for aviation resources.

On June 27, the Forest Service submitted another request for reapportionment seeking an increase in the overall funding level for the fourth quarter. *See* SF 132 *Apportionment and Reapportionment Schedule*, July 21, 2006. Consistent with the June 15 "Action by OMB" column of the schedule, the Forest Service request reflected that the footnote limitation had been removed and did not request reinstatement of the limitation. *Id.* Nevertheless, on July 21, OMB reinserted the limitation on the acquisition of aviation resources by adding a footnote in the "Action by OMB" column, next to the fourth quarter apportionment amount, providing that "Not more than $100,000,000 of suppression funds in all quarters is available for acquisition of aviation resources." *Id.* OMB offered no explanation for reinserting the footnote.

The Forest Service states that July was a catastrophic month for wildland fire activity, and the Forest Service fire organization moved to a preparedness level 5 for the first time since 2003. Request for USDA Legal Opinion, at 1. Fire suppression expenditures, including those for aviation resources, increased significantly due to this increased fire activity, and by the end of July, the Forest Service had obligated approximately $118 million for aviation resources. *Id.* The Forest Service estimates that it exceeded the $100 million limitation set out on the July 21 apportionment schedule sometime between July 25 and July 31. Telephone conversation of September 13.

On August 3, having exceeded the $100 million limitation, the Forest Service submitted a request for reapportionment to the USDA Office of Budget and Program Analysis (OBPA), requesting an increase in the aviation resource limitation. Request for USDA Legal Opinion, at 1. On August 4, the Forest Service and OBPA participated in a conference call with OMB to request a reapportionment, acknowledging that the Forest Service had already exceeded the $100 million limitation for aviation resources. *Id.* On August 4, OMB increased the limitation to $175 million. SF 132 *Apportionment and Reapportionment Schedule*, Aug. 4, 2006. OMB subsequently increased this limitation to $250 million and ultimately to $270 million through additional reapportionments. SF 132 *Apportionment and Reapportionment Schedules*, Aug. 24, 2006, Sept. 29, 2006.

DISCUSSION

The Forest Service asks whether it violated the Antideficiency Act when it obligated funds in excess of the $100 million that OMB had apportioned on July 21 for aviation resources as set forth in the apportionment schedule footnote. The agency states that the footnotes in its apportionment schedules cover so many activities that at some point the "logistics of requesting additional apportionment or revision of the footnotes, combined with the highly fluid and volatile nature of conducting emergency operations dictates that non-compliance is highly likely to occur." Request Letter, at 6. The Forest Service argues that its actions should not be considered a violation because they were necessary to support emergency activities.

It questions whether noncompliance with the footnote's $100 million limitation in such circumstances constitutes a violation of the Act.

Under the Antideficiency Act, the President is required to apportion funds to executive branch agencies. 31 U.S.C. §§ 1512, 1513. The President delegated this authority to the Bureau of the Budget, now OMB. Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note. An agency may not obligate or expend funds exceeding an apportionment or any other subdivision of funds as specified in an agency's regulations. 31 U.S.C. § 1517(a); B-305484, June 2, 2006; OMB Cir. No. A-11, at § 145. Generally, apportionments control the rate of spending during the year by limiting the amount of funds that can be obligated—typically by time periods, activities, projects, objects, or a combination thereof. OMB Cir. No. A-11, at § 120.8. An appropriation for an indefinite period must be apportioned to achieve the most effective and economical use. 31 U.S.C. § 1512(a).

Here, the Forest Service acknowledges that OMB had limited the apportionment for aviation resources to $100 million,[3] and that by the end of July, it had exceeded that limitation. Request Letter, at 2. In October 2005, the Forest Service had advised OMB that $100 million could be insufficient. *Id.* The record submitted to us by the Forest Service does not indicate why OMB, in light of the Forest Service's assertion, chose to retain this limitation. While the Forest Service complains about the difficulty of adhering to restrictions contained in numerous and prescriptive footnotes to the apportionment schedule, the agency was aware that the limitation was in effect on July 21. The agency did not request a reapportionment in July prior to obligating funds in excess of the apportionment; rather, it waited until August 4, after it knew that it had exceeded the limitation. OMB approved the reapportionment on that same day. However, at that point, the violation had already occurred, and the fact that funds were subsequently reapportioned to cover the obligations does not alter this conclusion. *See* B-253164, Aug. 23, 1993 (obligation of funds exceeding an apportionment limitation violated the Antideficiency Act even though the agency had submitted a reapportionment request where the obligation occurred before OMB signed the reapportionment request).

The Forest Service argues that its failure to adhere to the apportionment limitation should not be considered a violation of the Antideficiency Act because of the emergency nature of the wildfire suppression activities. The Forest Service, in support of its argument, points to the "emergency" provisions of the Antideficiency

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[3] While the Forest Service questions the use of a footnote to impose the limitation, we see no basis to object to the use of a footnote to impose an amount restriction on an activity. Although not in effect at the time of the activities at issue here, the 2007 revision to the circular specifically clarified that authorizing or incurring an obligation exceeding an incorporated apportionment footnote is a violation of the Antideficiency Act. OMB Cir. No. A-11, at § 145.2.

Act, 31 U.S.C. §§ 1342, 1515. Section 1342 addresses circumstances where an emergency necessitates the acceptance of services resulting in an obligation of funds in excess of the amount authorized by law. The second provision, 31 U.S.C. § 1515, applies where OMB apportions an amount that would indicate the necessity for a deficiency or supplemental appropriation.

Neither section 1342 nor section 1515 excuses the violation here. Importantly, the violation was based on the statutory prohibition against obligating funds in excess of an apportionment, an amount set by OMB through an administrative process set forth in Circular No. A-11. OMB Cir. No. A-11, at § 120. Had Congress not appropriated sufficient funds to allow the agency to respond to the emergency, sections 1342 and 1515 would be quite relevant, but that is not the case here. Instead, the aviation resource limitation, not the overall appropriation level, was at issue and was well below the amount appropriated. Accordingly, the exception in the Antideficiency Act for incurring obligations in excess of appropriated amounts to address emergencies does not address the circumstances here.[4] Rather, the Forest Service had an administrative solution available to it through OMB: "When emergencies, such as those involving the safety of human life or the protection of property, require immediate action, you may request, and OMB may approve, a reapportionment by telephone. As soon thereafter as it is practical, submit apportionment schedules reflecting such action."[5] OMB Cir. No. A-11, at § 120.37.

The Forest Service did not invoke this emergency provision and obligated funds in excess of the limitation. It then requested a reapportionment. The Forest Service does not explain why it failed to take advantage of OMB's expedited emergency procedure when, in July, the Forest Service moved to preparedness level 5 for the first time since 2003. Fighting fires of course requires prompt action, and protecting life and property is of paramount importance. As the Forest Service points out, wildfire suppression activities are fought on an interagency basis and teams consist of employees of the Forest Service, Department of Interior, and state forestry agencies. Decisions on the use of aviation resources and which fires should be

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[4] Section 1515 is not applicable for the same reason. It authorizes OMB to increase an apportionment to a level that would indicate the need for a deficiency or supplemental appropriation under limited circumstances, including emergencies. For example, an agency may seek an increase in its first quarter apportionment that, if maintained for each quarter, would result in an overobligation; however, this result would be avoided if the increase were offset by apportionment reductions in future quarters or through subsequent appropriations. It does not authorize agencies to incur obligations in excess of appropriations or apportionments. B-167034, Sept. 1, 1976.

[5] OMB staff confirmed that use of the expedited procedures is appropriate for handling a request for reapportionment of funds to respond to fire emergencies.

suppressed are made by an interagency team, and the Forest Service states that it does not have exclusive control over these spending decisions. Nevertheless, it is incumbent on the Forest Service officials with fund control responsibilities, who should be aware of the limitation and how close the agency is to exceeding that limitation, to attempt to utilize OMB's procedures by contacting OMB by phone before the agency exceeds the limitation rather than afterwards.

While we believe that had the Forest Service availed itself of OMB's expedited emergency procedure it may well have avoided its Antideficiency Act violation, the record here suggests that there may have been some confusion in June and part of July about the status of the limitation. The apportionment schedules indicate that in June, for reasons unexplained, OMB unilaterally removed the limitation that had been a point of contention from the beginning of the fiscal year, only to reinstate it on July 21 for the last quarter of the year, just days before the Forest Service ultimately exceeded it. Nevertheless, the Forest Service is presumed to have knowledge of both the apportionment limitation and its remaining unobligated balance, and it was expected to take action as necessary to avoid noncompliance.[6]

CONCLUSION

The Forest Service violated the Antideficiency Act, 31 U.S.C. § 1517, when it exceeded the apportionment limitation by obligating in excess of $100 million for aviation resources for fiscal year 2006 forest fire suppression activities. The Antideficiency Act requires that if an officer or employee of an executive agency violates the Act, the agency head "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351. We recognize that the agency immediately took action to address the issue by seeking and obtaining a reapportionment to cover its obligations and that the necessary adjustments were made in the same fiscal year. Nevertheless, the Forest Service violated the Act and should formally report the violation to the President and to Congress.

[6] OMB Circular A-11 provides that agencies should review their fund control regulations periodically to determine whether improvements should be made and, at a minimum, whenever staff from the agency has violated the Antideficiency Act. OMB Cir. No. A-11, at § 150.7.



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