F. Jackson

Comptroller General
of the United States

Washington, D.C. 20548

DO NOT MAKE AVAILABLE TO PUBLIC READING
FOR 30 DAYS

B-238581

October 31, 1990

The Honorable John P. Murtha
Chairman, Subcommittee on Defense
Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

By letter dated February 1, 1990, you asked for our opinion on whether the Air Force, before using $13.5 million to keep the B-1B's ALQ-161A core (Core) program operational, complied with the congressional notification requirement of section 9071 of the Department of Defense Appropriations Act for fiscal year 1990, Pub. L. No. 101-165, 103 Stat. 1112, 1145 (1989) (Appropriations Act). We have determined that the Air Force complied with section 9071.

BACKGROUND

In 1982, the Air Force awarded contracts to Eaton Corporation for the development and production of 100 units of the ALQ-161A and related support equipment. Because of performance and production problems and design deficiencies, the Air Force is negotiating with Eaton a scaled-down version of that contract, i.e., the Core program.1/ According to the Air Force, it has periodically obligated limited amounts to fund operations for specific increments of time. The Air Force explained that the incremental funding of the contract allows it to continue to correct the ALQ-161A's design and hardware deficiencies, while providing the Congress an opportunity, before the Core program is fully funded, to review that program.

The Air Force informs us that on November 1, 1989, it obligated $22 million to the contract to fund operations through January 31, 1990. Unless additional funds were forthcoming, the contract would terminate on January 31; paragraph 17(a) of the contract allows Eaton to refuse to continue performance once it incurs costs equal to the amount obligated on the contract.

1/ See GAO Report, Strategic Bombers: B-1B Program's Use of Expired Appropriations, GAO/NSIAD-89-209 (Sept. 5, 1989).

550550/142950

Included in those costs would be termination costs. Paragraph 17(b) of the contract limits Air Force termination liability to an amount not to exceed the funds obligated on the contract. This limitation would preclude Eaton from recovering termination costs if no money remained on the contract upon termination. Consequently, as dictated by good business practice, Eaton kept an accounting of the unliquidated funds which were obligated on the contract so as to guarantee that sufficient amounts remained to liquidate termination costs. Thus, on January 31, when Eaton's termination costs equalled the amount remaining on the contract, the Air Force could not demand that Eaton continue to perform unless the Air Force obligated additional funds to the contract.

Correspondence between the Air Force and Eaton shows that the Air Force did not want the contract to terminate on January 31. In order to ensure a continuation of contract operations, the Air Force decided to explore the possibility of applying to operations obligated but unliquidated funds that might otherwise be used to cover termination costs. In this regard, by letter of January 19, the Air Force asked Eaton to advise it of the total amount of the funds, obligated on the contract but not yet liquidated, that Eaton would need to cover termination costs on January 31. Eaton responded that it would need $13.5 million (in addition to other funds available to the contractor) to cover termination costs, but that if those funds were used to continue performance rather than to pay for termination, contract operations could continue through March 9, 1990.

Effective January 31, the Air Force and Eaton added a new termination clause to the contract providing that if Eaton applied all remaining obligated funds in continuation of performance, the Air Force would make available sufficient funds to cover Eaton's termination costs. Under the terms of the new clause, the Air Force, upon termination at the convenience of the government, will pay Eaton up to $13.5 million in "special termination" costs, as defined by the contract. The Air Force considered the new clause a contingent liability; thus, it did not record an obligation to cover the "special termination" costs. As a result of the new clause, however, the Air Force committed itself either to continue funding the contract or to pay for termination costs. Eaton, no longer concerned about financing termination, applied the $13.5 million obligated on the contract, which might otherwise have been used to pay termination costs, to continue performance through March 9.

In order to ensure funding to continue operations after March 9, the Air Force, by letter of January 24, notified the Congress that it would restore $418 million from its expired,

unobligated appropriation accounts to use on the Core program.2/

ANALYSIS

Section 9071 of the Appropriations Act provides that:

> "None of the funds available to the Department of Defense, including expired appropriations and M account balances, may be used for the B-1B's ALQ-161A CORE program unless the Secretary of Defense has notified the Congress in advance of his intention to use funds for such purpose. . . ."

Pub. L. No. 101-165, 103 Stat. at 1145-46.

In our view, this provision, enacted November 21, 1989, requires the Secretary of Defense (the Secretary) to notify the Congress before he obligates3/ any additional funds to the Core program. If the Air Force did not obligate additional funds, section 9071 does not apply. The first question raised in addressing section 9071, then, is whether the Air Force, on January 31, obligated any additional funds to the contract.

The Air Force, in effect, undertook two actions on January 31: it instructed Eaton to continue performance at least until March 9, and it agreed to a new termination provision in Eaton's contract. As discussed above, the $13.5 million used to finance operations after January 31 had already been obligated on the contract (but not yet liquidated). Therefore, section 9071 did not require notification of its use to liquidate amounts billed by Eaton.

With regard to the new termination provision, Air Force officials state that since the Air Force may never have to pay the "special termination" costs, the new clause creates a

---

2/ On March 10, 1990, the Air Force obligated $26 million to the contract to fund performance through May 31. An Air Force official informs us that the Air Force obligated an additional $23.3 million to the contract on June 19, 1990, and $13 million on August 18.

3/ The law's conference report recommends that notification take the form of "prior approval reprogramming." See H.R. Conf. Rep. No. 345, 101st Cong., 1st Sess. 140 (1989). A prior approval reprogramming takes place prior to that point in time when funds are obligated to a contract as opposed to the time, for example, when obligated amounts are liquidated.

contingent liability which does not constitute an obligation.4/ We disagree. The "special termination" costs cannot be viewed as a contingent liability. Until the Air Force fully funds the contract,5/ the Air Force has a firm obligation to pay Eaton $13.5 million over and above whatever amount the Air Force has incrementally committed to the contract. In other words, should the Air Force decide not to further incrementally fund the contract, the Air Force remains liable to Eaton for $13.5 million. In similar situations, we have held that the government has obligated the amount of the termination liability. See 62 Comp. Gen. 143, 146-47 (1983). See also 48 Comp. Gen. 497, 502 (1969). We conclude, therefore, that the new termination provision effected an obligation of $13.5 million.

Having determined that the Air Force incurred an obligation, we now turn to the question of whether the Air Force satisfied the notice provision of section 9071 of the Appropriations Act. As noted above, this provision requires the Secretary to notify the Congress, in advance, of his intention to obligate funds to the Core program. In our opinion, the January 24 letter, notifying the Congress that the Air Force would obligate $418 million more to the Core program contract, satisfies this requirement.

It appears, however, that the Air Force may not have complied with section 1603 of the National Defense Authorization Act for fiscal years 1990 and 1991, Pub. L. 101-189, 103 Stat. 1352, 1597 (1989) (Authorization Act). Section 1603 provides that if the Defense Department plans to withdraw, in any one fiscal year, more than $25 million from its expired, unobligated appropriation accounts, it must notify Congress and wait 30 days before restoring any funds. 103 Stat. at 1597. The Air Force incurred the $13.5 million obligation seven days after the Secretary notified the Congress of Air

---

4/ As a general matter, a contingent liability does not constitute a valid obligation under 31 U.S.C. § 1501, the statute governing the recording of obligations; thus, the government does not record an obligation based on a contingent liability until the contingency occurs. See 54 Comp. Gen. 824, 827 (1975); 42 Comp. Gen. 708, 712 (1963).

5/ This process of either paying "special termination" costs or obligating additional money on the contract will continue until the Air Force fully funds the contract. Paragraph 5 of the "special termination" provision states that the provision shall remain in full force until the Air Force fully funds the contract.

Force's intention to restore $418 million from the expired, unobligated accounts. (The Air Force should have recorded the obligation but did not because it considered the $13.5 million in "special termination" liability to be a contingent liability.) According to its letter of January 24, the Air Force apparently intended to record all obligations for the Core program against amounts in the expired, unobligated accounts. Pursuant to section 1603 of the Authorization Act, amounts to cover these obligations were not available for restoration prior to the expiration of the 30-day waiting period.6/

I hope that you find our views useful. In accordance with our general policy, we will furnish the Air Force a copy of this letter 30 days from today, unless you release it earlier, and will make the letter generally available to other interested parties at that time.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

6/ Air Force officials have informally advised us that the Air Force could have reprogrammed funds within the fiscal year 1990 Aircraft Procurement appropriation to cover the $13.5 million obligation. Had the Air Force used current funds to cover the new obligation of $13.5 million, section 1603 of the Authorization Act would not apply.