

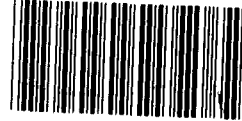
144013



Comptroller General  
of the United States  
Washington, D.C. 20548

B-241514.5

May 7, 1991



144013

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

This letter reports a deferral of Department of Defense (Department) budget authority that should have been, but was not, reported to the Congress by the President under the Impoundment Control Act of 1974. Section 1015(a) of the Impoundment Control Act, 2 U.S.C. § 686(a), requires the Comptroller General to report to the Congress whenever he finds that any officer or employee of the United States is to establish a reserve or has ordered, permitted, or approved of such a reserve or a deferral of budget authority, and the President has failed to transmit a special impoundment message with respect to such reserves or deferrals. This report is submitted in accordance with section 1015(a) and has the same effect as if it were a special message transmitted by the President.

The deferral in question occurs in the fiscal year 1991 appropriation account "Aircraft Procurement, Navy," Pub. L. No. 101-511, 104 Stat. 1864 (1990), and involves \$165,000,000 earmarked by the Fiscal Year 1991 National Defense Authorization Act only for advance procurement of the V-22 Osprey tilt-rotor aircraft. Pub. L. No. 101-510, § 152, 104 Stat. 1485, 1505 (1990).

According to the Department, the \$165,000,000 is being withheld pending congressional authorization to transfer the procurement funds to the Navy's "Research, Development, Test, and Evaluation" (R&D) account, which the Department has advised would be used for additional V-22 R&D work. The transfer request, submitted as part of the President's fiscal year 1992 budget, proposes the following legislative language:

"Of the funds appropriated for fiscal year 1991, under the heading Aircraft Procurement, Navy for the V-22 Osprey program, \$165,000,000 are transferred to the appropriation, Research, Development, Test, and Evaluation, Navy 1991/1992 to be merged with and to be available for the same purposes and the same time period as the appropriation to which transferred."

Budget of the United States Government, Fiscal Year 1992, Part Four 545, § 8049 (1991).

05502 / 144013

## BACKGROUND

In December 1989, the Department decided to cancel the V-22 because of its high cost relative to its narrow mission and the availability of an alternative (helicopters) that could perform the same missions at less cost. The Department used \$133.9 million, of \$333.9 million in fiscal year 1989 appropriations originally obligated for pilot production, for termination costs and other liabilities. This left \$200 million available for other purposes. See GAO, Navy Budget: Potential Reductions in Aircraft Procurement Budget (GAO/NSIAD-91-65, Jan. 16, 1991).

On February 6, 1990, the President, in a special impoundment message, reported a deferral of this \$200 million in fiscal year 1989 funds because the V-22 program was proposed for termination and as a "contingency against incurring additional unnecessary sunk costs." Our Office concluded this was an unauthorized deferral. GAO/OGC-90-4, B-237297.3, Mar. 6, 1990. We reasoned that although the Congress did not provide fiscal year 1990 production funding for the V-22, it had made a clear policy choice to continue advance procurement of the V-22 by maintaining the availability of the fiscal year 1989 funds for that purpose. See Pub. L. No. 101-189, § 151, 103 Stat. 1386 (1989). In view of that decision, the Administration's justification for deferring the funds was insufficient under the Impoundment Control Act. GAO/OGC-90-4. The real purpose of the deferral seemed to be to substitute the Administration's policy for one already decided by the Congress. Id. Since the executive branch may not defer for policy reasons, we concluded the deferral was unauthorized. Id.

The Department's fiscal year 1991 budget submission again did not include any procurement funds for the V-22. The National Defense Authorization Act for fiscal year 1991, however, specifically earmarked \$165 million of funds authorized to be appropriated for Navy aircraft procurement to be available "only for advance procurement of production representative V-22 aircraft, support equipment and related activities." Pub. L. No. 101-510, § 152, 104 Stat. 1485, 1505 (1990). The Act specifies that the \$200 million in fiscal year 1989 funds be used for the same purposes. The Act also authorizes \$238 million for V-22 R&D, and prohibited the expenditure of the R&D funds on any other alternative (helicopter). Id. at § 211, 104 Stat. 1509.

Both the \$165 million for procurement and \$238 million for R&D are part of lump-sum appropriations in the fiscal year 1991 Defense Appropriations Act. Pub. L. No. 101-511, 104 Stat. 1856, 1864 (Procurement), 1868 (R&D) (1990); H.R. Rep. No. 938, 101st Cong., 2nd Sess. 78, 105 (1990). Section 8101 of

the appropriation act specifies that the \$200 million in fiscal year 1989 procurement funds "shall be made available to the Department of the Navy for obligation for the V-22 Osprey tilt-rotor aircraft program." Pub. L. No. 101-511, § 8101, 104 Stat. 1897 (1990).

In his third special impoundment message for fiscal year 1991, the President proposed the \$200 million in fiscal year 1989 funds for rescission because the V-22 is not sufficiently developed to enter production. The Dire Emergency Supplemental Appropriation for fiscal year 1991, Pub. L. No. 102-27, \_\_\_ Stat. \_\_\_ (1991), in effect rejects this proposal by mandating obligation of the \$200 million for the V-22 no later than 60 days from enactment of the supplemental and makes the funds available on a no-year basis until they are expended for the V-22.

Again, the Department has stated that the \$165 million in funds are being withheld pending congressional approval of a transfer request from Navy procurement to Navy R&D because \$165 million is needed to complete R&D on the V-22. We understand that the Office of Management and Budget's position is that there is no impoundment because the \$165 million in V-22 advance procurement funds has been apportioned and is available for obligation.

## ANALYSIS

### PROGRAMMATIC DELAYS

First, our decisions distinguish between programmatic withholdings outside the reach of the Impoundment Control Act and withholdings of budget authority that are deferrals subject to the Act's requirements. Thus, we have stated that programmatic delays typically occur when an agency is taking necessary steps to implement a program even if funds temporarily go unobligated. GAO/OGC-91-3, B-241514.2, Feb. 5, 1991. This presupposes that an agency is making reasonable efforts to obligate funds and that the delay is, even with such efforts, unavoidable. Id.

The delays associated with the V-22 are not, under these criteria, programmatic. There are no external factors that are unavoidably delaying the obligation of funds. It is true that the V-22 is experiencing developmental difficulties. See GAO, Naval Aviation The V-22 Osprey - Progress and Problems (GAO/NSIAD-91-45, Oct. 12, 1990). However, with respect to this particular program, development delays need not impede timely obligation of funds for the advance procurement of production representative aircraft. First, the V-22 is a concurrent project that envisions production to proceed parallel to development. Second, the Congress is

aware of and has recognized the developmental difficulties with the V-22. Specifically, in authorizing appropriation of funds for "advance procurement of production representative V-22 aircraft", the Congress expressed its intent that funds be obligated for the procurement of a production representative aircraft and that such a production representative aircraft will "permit final resolution of technical problems on the V-22." Thus, we do not consider the withholding of the \$165,000,000 to be a so-called programmatic delay.

#### DEFERRAL

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. § 682(1).

We conclude that the Department's action constitutes a deferral. The mere fact that funds are apportioned and technically available for obligation does not preclude the existence of an impoundment of budget authority. GAO/OGC-91-3 (Feb. 5, 1991); B-224882, Aug. 3, 1987. It is possible for an agency to effect an impoundment after OMB apportions funds. GAO/OGC-91-3. Where the head of a department, or any officer or employee of that department, takes an administrative action resulting in the withholding or delaying of the obligation of budget authority, such an action may constitute a deferral. Here, the obligation of budget authority has intentionally been delayed as a result of a departmental program decision to continue to fund development of the Osprey technology but not to move forward with production. The fact that funds have been apportioned and are technically available does not change the fact that funds are being withheld from obligation pending congressional action on a transfer request.

#### AUTHORIZED AND UNAUTHORIZED DEFERRALS

The next question is whether the withholding of the \$165 million is an authorized deferral under the Impoundment Control Act. 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. § 684(b). Deferrals for any other purposes are not authorized. Id. We have specifically ruled (in an opinion involving the V-22) that the Act does not permit deferrals for policy reasons. GAO/OGC-90-4, Mar. 6, 1990.

As noted above, the V-22 is experiencing developmental difficulties, i.e., vibration, weight, and software development problems, that are affecting full scale development testing and could affect producibility if a production decision is made. GAO/NSIAD-91-45 supra. at 2, 4. Congress, however, clearly intended \$165 million to be used for the advance procurement of V-22 production representative aircraft, notwithstanding the fact that the V-22's current developmental problems relate to the flying integrity of the aircraft. The Conference Report accompanying the fiscal year 1991 authorization states that:

"Procurement of a production representative prototype will also permit final resolution of technical questions on the V-22 to include the weight reduction plan, vibration reduction designs and full validation of operational flight software . . . the decision this year to authorize procurement funds does not constitute a commitment to build the V-22. Rather it represents a commitment to build production representative aircraft that can be used solely for operational testing to prove conclusively the promise inherent in the V-22 design."

H.R. Rep. No. 923, 101st Cong., 2nd Sess. 487, 488 (1990).

Thus, although no commitment or decision has been made to procure the V-22 Osprey, Congress has made a clear policy decision that advance procurement of production representative aircraft should begin now. The Department's position, however, conflicts with this mandate. Sean O'Keefe, Comptroller, Department of Defense, in recent testimony before the Congress, outlined the Department's intentions with regard to the V-22 program. He stated:

"The Secretary is committed to continued development of the aircraft to explore the technology . . . as a consequence he sees no

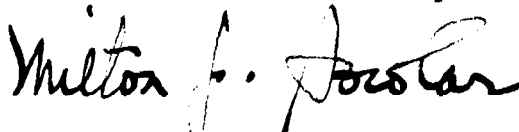
utility in trying to form up or to craft an advance procurement contract for an aircraft that clearly . . . is not ready for production in 1992. . . ."

"He has stated several times and has not changed whatever as recently as yesterday in my conversation with him, in pursuing any production program. . . ."

"What is holding up production is the Secretary has no intention of proceeding with production of the program. What he has agreed to and what he is prepared to continue is the development of the aircraft. But as far as production is concerned he; he has been unequivocal in that point. He does not intend to proceed in that direction."

V-22 Osprey Program Review, Hearing Before the Subcommittee on Procurement and Military Nuclear Systems and the Subcommittee on Research and Development of the House Armed Services Committee, 102nd Cong., 1st Sess. (Apr. 11, 1991) (Reporter's unedited transcript) (emphasis added).

Thus, it seems clear that the Administration's decision not to obligate the funds in fiscal year 1991 for advance procurement of production representative V-22s but instead to seek their transfer to another account which, in all probability, will not be used in fiscal year 1991, is an attempt to replace the policy decision already made by the Congress with its own. Since the Impoundment Control Act does not authorize deferrals for policy reasons, we conclude that the deferral we are reporting is unauthorized.



**Acting** Comptroller General  
of the United States