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Comptroller General
of the United States

Washington, D.C. 20548

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June 3, 1992

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

This letter reports an impoundment 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 (Act). Section 1015(a) of the 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 of budget authority, and the President has failed to transmit a special impoundment message with respect to such reserve. 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.

BACKGROUND

The impoundment in question occurs in the fiscal year 1992 account "Research Development, Test and Evaluation, Navy", Pub. L. 102-172, § 8090, 105 Stat. 1193 (1991), and involves $790,000,000 appropriated only for the V-22 program.[1] We have previously reported on impoundments involving the V-22 program. See GAO/OGC-90-4, B-237297.3, Mar. 6, 1990 (unauthorized policy deferral of $200 million); GAO/OGC-91-8, B-241514.5, May 7, 1991 (unauthorized policy deferral of $165 million).[2]

[1]The $790 million consists of $625 million in fiscal year 1992 budget authority earmarked by § 8090 out of the Navy RDT&E account and $165 million transferred from the fiscal year 1991 "Aircraft Procurement, Navy" account. Pub. L. 101-511, 104 Stat. 1864 (1990).

[2]GAO/OGC-91-8 contains a detailed history of other impoundment actions taken with regard to the V-22 program.

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CURRENT STATUS OF V-22 BUDGET AUTHORITY

In the fiscal year 1992 authorization and appropriations process, the Congress transferred the $165,000,000 reported as a deferral in our 1991 report (GAO/OGC-91-8) to the fiscal year 1992/1993 Navy RDT&E account to be merged with $625 million in new RDT&E budget authority. See Pub. L. 102-190 § 211, 105 Stat. 1315 (1991); Pub. L. 102-172, § 8090, 105 Stat. 1193 (1991). The Appropriations Act directs that these funds be obligated for a Phase II V-22 Full Scale Development Program to provide new production representative aircraft which will have the objective of demonstrating the full operational requirements of the Joint Services Operational Requirement (JSOR) not later than December 31, 1996. The Appropriations Act specifically provides that the Secretary of Defense "shall take no action which will delay obligation of these funds." Id. The Act also requires the Secretary to provide to the Congress within 60 days of enactment of the appropriation Act a total funding plan and schedule to complete the Phase II V-22 full scale Engineering Manufacturing Development. Id.

By letter of January 26, 1992, the Department's Comptroller advised the Congress that substantial redesign was necessary in order to meet the JSOR. The Comptroller added that the total estimated cost of the Congressionally mandated manufacture and test of the V-22 would be in excess of $2.5 billion and that no additional source of funding had been identified. The Comptroller added that he did not believe it would be possible to satisfy the Congressionally mandated 1996 deadline even if Congress appropriated additional funding. Finally, he stated that the Department would not be able to spend the $790 million before it expired, and therefore proposed that Congress extend the availability of the funds.

By letter of April 2, 1992, Secretary Cheney provided additional information to supplement the views of the Comptroller. He noted that the Navy had presented alternative plans, none of which would satisfy the statutory mandates in Pub. L. 102-172 because the legislation was too restrictive in terms of funding, schedule, and tooling. The Secretary reiterated the Department's position that the V-22 required substantial redesign and testing. He further explained that one alternative, to revert the V-22 program to a technology demonstration project, could not be done since it would not comport with the statutory mandates expressed in P.L. 102-172. At the end of his letter, the Secretary stated:

> "We do not, however, intend to execute this program, because it is not affordable within the overall constraints we face on defense

> resources . . .. We continue to work to find a solution which meets our amphibious medium lift needs affordably".

The Office of the Secretary of Defense is currently withholding from obligation $790 million of V-22 funds. In response to our request for the Department's legal justification for the withholding, the Department's Acting General Counsel explained that the V-22 aircrafts require major redesign. Accordingly, the Department maintains that "it is not factually or technically possible for the Department to comply with the provisions of section 8090." In so concluding, the Acting General Counsel reads section 8090 as imposing two separate requirements: (1) the FY 1992 funds must be obligated for new production aircraft having the objective of demonstrating the full operational requirements of the JSOR and (2) the "aircraft must have the objective of demonstrating those requirements not later than December 31, 1996." The acting General Counsel maintains that since it is impossible to satisfy the two requirements of section 8090, the Department may not obligate these funds and thus there is no impoundment within the meaning of the Impoundment Control Act.

Finally, the Acting General Counsel explains that the Secretary of Defense's statement in his letter to the Speaker of the House that "[w]e do not, however, intend to execute this program . . . ." was not intended to have, nor should it be construed as having, Impoundment Control Act implications. Instead the Acting General Counsel cautions that the Secretary's remark reflects no more than the Department's consistent opposition to what it views as an unaffordable program.

ANALYSIS

The issue before us is whether the failure by the Office of the Secretary of Defense to release for obligation the $790 million of V-22 funds constitutes an impoundment reportable under the Impoundment Control Act. In this regard, our opinions distinguish between programmatic delays in obligation that are outside the reach of the Impoundment Control Act, and withholdings of budget authority that constitute impoundments under the Act's provisions. We have observed that programmatic delays typically occur when an agency is taking necessary steps to implement a program, but because of factors external to the program funds temporarily go unobligated. GAO/OGC-91-8 (May 7, 1991). This assumes, of course, that the agency is making reasonable efforts to obligate.

In our opinion, the failure to release the V-22 funds cannot be viewed as programmatic under the circumstances described

by the Department. It is true that the V-22 continues to experience developmental difficulties. However, when the Congress appropriated new budget authority for the V-22 in Public Law 102-172, it was well aware of these difficulties and expected the Secretary to embark on a program to correct identified deficiencies and produce production representative aircraft. H.R. Rep. No. 328, 102nd Cong., 1st Sess. 152 (1991). It is also true that the Senate Committee on Armed Services (like the Department) has expressed concern regarding the affordability of the V-22. Sen. Rep. No. 113, 102nd Cong., 1st Sess. 115 (1991). Nevertheless, in the end, both the authorization and the appropriation legislation direct, in very specific terms, the Department to continue developing the V-22.

According to the Department, section 8090 of the fiscal year 1992 Department of Defense Appropriations Act is too restrictive in terms of funding, tooling and scheduling, thereby making it "factually and technically" impossible to execute the program and obligate the funds in compliance with section 8090. We disagree.

We recognize that it may not be possible to demonstrate the full operational requirements of the JSOR within the 1996 timeframe established by the Congress, and that Congress may, if it deems it appropriate, extend the timeframe. Unlike the Department, however, we view the 1996 date as a goal rather than a firm deadline. Given the prior difficulties Congress has experienced in the Department's execution of the program, we think Congress placed the December 31, 1996 date in the statute to spur the Department to early implementation, not to condition the use of the funds for program purposes. We do not accept the view that the Department's ability to meet that date is a condition precedent to the availability of the funds for obligation. The Department's lack of confidence in its ability to fully satisfy the statutory objectives does not free it from the obligation to use its best efforts to obligate funds in faithful execution of this legislatively mandated program.

Finally, we do not agree with the Acting General Counsel's assertion that the Secretary's statement is devoid of any Impoundment Control Act implications. We view the Secretary's statement as a clear indication on his part not to execute this program. We also cannot ignore the Department's past attempts to retard the V-22 program through unauthorized withholdings. All these actions taken together reflect an intent to reserve funds that should have been, but were not, proposed for rescission.

As noted above, under the Impoundment Control Act, whenever the Comptroller General finds that the head of any department or agency of the United States, or any officer or

employee of the United States has established a reserve of budget authority for which the President is required to but has not transmitted a special message with respect to such a reserve, he is required to report it to the Congress. 2 U.S.C. § 686(a).

In the instant case, the Department has advised that the funds are being withheld from obligation because the statutory mandates make it impossible to obligate the funds. Thus, the Department argues that as long as the statutory provisions exist, the funds are not available for obligation. The consequence of the Department's position is that the funds are not and will not be available for obligation until the restrictive statutory conditions are changed. Alternatively, if the restrictive statutory conditions are not changed, the Department's position leads to the conclusion that the funds will be withheld until they expire. Based on the Secretary's statements, the Department's legal justification, and our prior experience with this program, we view the Department's action as attempting to effect a rescission in fact of V-22 budget authority that should have been reported as a proposed rescission.

Accordingly, pursuant to the Impoundment Control Act of 1974, we are apprising the Congress of the unreported withholding of budget authority. Since, in our opinion, the Department presently does not intend to make the $790 million in budget authority for the V-22 available for obligation prior to its expiration, we consider the funds as being reserved from obligation without a special message transmitted as required by section 1012(a) of the Impoundment Control Act of 1974, 2 U.S.C. § 683(a).

We note that this impoundment report has the effect, by operation of law, of permitting the withholding to continue for 45 legislative days unless the Congress earlier disapproves the proposal. For purposes of this report and based on the current Congressional calendar, the 45-day period during which the funds may be withheld expires on August 3, 1992.

Milton J. Socolar

for Comptroller General
of the United States