



Comptroller General  
of the United States

Washington, D.C. 20548

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November 5, 1993

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

This letter reports deferrals of budget authority in the General Services Administration (GSA) building programs that should have been, but were not, reported to the Congress by the President pursuant to the Impoundment Control Act of 1974 (Act), 2 U.S.C. § 681 et seq. (1988). 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 has ordered, permitted, or approved a reserve or deferral of budget authority, and the President has not transmitted a special impoundment message with respect to such reserve or deferral.

On September 9, 1993, Kenneth R. Kimbrough, Commissioner of the Public Buildings Service, instructed all assistant regional administrators to undertake an immediate review of new public buildings projects not yet under construction. GSA directed the review in order to "step back and assure that the need for new public buildings projects is justified". GSA News Release, September 16, 1993. The projects to be reviewed can be found in a master list of approximately 188 GSA projects. Commissioner Kimbrough advised the assistant regional administrators that:

"Until the aforementioned projects have been reviewed and cleared by Central Office, the regions shall not proceed with any of the following actions:

- award any new design, construction, construction management services or other major related contracts;
- award lease contracts;
- procure any sites; or
- issue new solicitations or requests for proposals.

For solicitations which have been issued, the regions shall, where necessary extend the bid opening dates or the closing dates for receipt of proposals." Memorandum for Assistant Regional Administrators from Commissioner, Public Building Service, Kenneth R. Kimbrough, dated September 9, 1993.

On September 16, 1993, the Administrator of GSA, Roger W. Johnson, publicly directed GSA's regional offices to perform this review of the building program. GSA News Release, September 16, 1993. As Mr. Johnson explained:

"During confirmation hearings, and since that time, I said that I was leaning toward a period of time out and review of the public buildings program. The administration in its National Performance Review Report, agreed that I should carry out the policy . . . .

With the President's call to modernize and streamline the Federal workplace, expanding the Federal portfolio of office space by adding net new space at this time seems contradictory . . . ."

In the Conference Report for Treasury, Postal Service Executive Office, and certain Independent Agencies Appropriation Act for fiscal year 1994, the Congress addressed the GSA review in the following manner:

"The conferees concur in the Administrator's decision to review these projects on the basis of merit and cost but are concerned that the practical effect of the construction moratorium is that budget authority previously provided for 188 different projects is being withheld from obligation.

"As required by the Impoundment Control Act, the General Accounting Office (GAO) is currently reviewing the Administrator's decision to withhold these funds to determine whether such action is reportable under the Impoundment Control Act . . . . If in the report GAO determines that a deferral is required, the Conferees direct the Administrator of GSA and the Comptroller General to follow existing deferral reporting procedures. The Administrator is also urged to expeditiously complete a review of these projects so as to not cause any unnecessary delays, costs or project slippage."

H.R. Rep. No. 256, 103rd Cong., 1st Sess. (1993) (reprinted in 139 Cong. Rec. H6991 (Sept. 24, 1993)).

Congress has defined a 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 . . . ."

2 U.S.C. § 682(1).

The Act authorizes deferrals only under the following circumstances:

"(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 purpose are not authorized. Id.

GSA's Office of General Counsel maintains that although the Commissioner ordered the regions not to award contracts for the aforementioned projects, GSA has not placed funds in a reserve. Further, the regions were explicitly ordered to prioritize their analysis of the projects to minimize the impact on project delivery schedules by reviewing those projects nearing major milestones first. Thus, according to GSA, the review "will not delay projects, and that if there is delay, it will be minimal delay."

Under GSA's reading of the Act, its project review does not rise to the level of a deferral of budget authority. In effect, GSA argues that the review constitutes a "programmatic delay" that falls outside the reach of the Act, and thus is not a deferral. In support of its position, GSA cites our decision, B-241514.12, Sept. 27, 1991. In that decision, we concluded that a delay by the Department of Veterans Affairs (VA) in obligating funds for a 290-bed psychiatric facility because of documented

demographic changes that supported only a 120-bed facility was programmatic.<sup>1</sup>

As GSA points out, our Office has held that not all delays in obligating or expending budget authority are impoundments. Our decisions have treated so-called programmatic delays as outside the reach of the Act and its reporting requirements. GAO/OGC-91-8, B-241514.5, May 7, 1991. Programmatic delays typically occur when an agency is taking necessary steps to implement a program but for reasons outside the agency's control funds nevertheless temporarily go unobligated. Id. Characterization of a delay as programmatic presupposes that an agency intends to, indeed is making all efforts to, obligate funds but that the delay is unavoidable. See GAO/OGC-91-3, B-241514.2, Feb. 5, 1991. For example, delays in obligating funds due to a low number of loan applications are programmatic in nature. B-115398, Sept. 28, 1976. Similarly, a delay in obligating funds pending a redesign of an icebreaker ship because of a reduction in the amount of funds appropriated constitutes a programmatic delay. GAO/OGC-90-4, B-237297.3, Mar. 6, 1990.

We do not agree with GSA's position that the current delay is not an impoundment. We think that there are significant differences between the VA decision relied on by GSA and GSA's project review. The former involved a project-specific delay based on documented changes while VA redesigned the project as a smaller facility. This situation mirrors precisely the type of project-specific delays to respond to changes driven by intervening events that we cited earlier. The same cannot be said, however, for GSA's project review. GSA's order halts all contracting activities program-wide while it reassesses the need for the projects not yet under construction. Thus, GSA's order does not resemble a project-specific programmatic delay of the type noted above. Rather, the directive to suspend contract awards for the listed projects clearly reflects a decision, in the language of the Impoundment Control Act, to delay the "obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities." 2 U.S.C. § 682(1).

In fact, we view GSA's project review in the same light as the Department of Defense's Military Construction (MilCon) moratorium that we reported as an authorized, but unreported, deferral in 1990. On January 24, 1990, then-

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<sup>1</sup>VA must award its major construction working drawings and construction awards under very strict statutory time frames. Any delays are statutorily subject to our Office's review for impoundment implications on an annual basis. See Pub. L. No. 101-144, 103 Stat. 842 (1989).

Secretary of Defense Richard Cheney directed a moratorium on all military construction projects pending a DoD review of the necessity for certain projects. On June 28, 1990, we reported the construction moratorium as a deferral. GAO/OGC-90-5, B-237297.7, June 28, 1990. GSA attempts to distinguish our MilCon decision from its ongoing project review on the basis that an agency has a "reasonable" amount of time to review its projects. GSA derives this proposition from its view that we delayed reporting Secretary Cheney's moratorium until February 1991 to allow DoD a reasonable amount of time to complete its review.

First, our Office reported the moratorium order as an authorized deferral on June 28, 1990, not in February 1991. GAO/OGC-90-5, B-237297, June 28, 1990. Second, we have never taken the view that an agency has a "reasonable" amount of time to defer funds.<sup>2</sup> However, the fact that we issued our deferral report 5 months after Secretary Cheney ordered the moratorium does not support the proposition that DoD had a reasonable amount of time to defer before we would report an impoundment. The amount of time taken in that case to report a deferral was a function of the time needed to gather and analyze the facts and to decide whether the moratorium constituted an unauthorized policy deferral or an authorized deferral under the Act. Although we concluded that the delay was a reportable deferral, we also held that (under the Act) Secretary Cheney's action qualified as an authorized deferral to "achieve savings made possible by or through changes in requirement or greater efficiency of operations," 2 U.S.C. § 684 (b) (2). With this precedent established, it now takes less time and analysis to review and process suspensions of obligational activities stemming from program or project reviews such as GSA's current review.

Like the MilCon moratorium, we also conclude that the deferral here is clearly authorized to "achieve savings made possible by or through changes in requirement or greater efficiency of operations." 2 U.S.C. § 684(b)(2). Thus, GSA's order relating to the aforementioned projects constitutes a reportable, but authorized, deferral under the Act.

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<sup>2</sup>We have held that agencies have a reasonable amount of time to report deferral actions. See GAO/OGC-78-10, B-115398, June 6, 1978. It has also been GAO policy that OMB has a reasonable amount of time to "batch" a number of impoundment actions into one comprehensive special message.

In accordance with section 1015 (a) of the Impoundment Control Act, we are reporting to the Congress the deferral of budget authority represented by the 188 projects covered by the GSA dated September 1993.

*Milton J. Ausler*

**Acting** Comptroller General  
of the United States