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A Note of Thanks

We'd like to thank those of you who took the time to call or send us a brief note concerning our first issue. We appreciate the interest shown in the "Adviser" and hope that it continues to benefit our readers.

In keeping with the objectives of the "Adviser," this issue discusses recurring questions that have come to OGC's attention regarding GAO's work.

Again, we solicit your views and hope that you won't hesitate to share with us any comments or suggestions for future issues.

The Editors

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WEEKEND RETURN FOR TEMPORARY DUTY TRAVELERS

Robert L. Higgins¹

No doubt many of our readers have experienced the problem of being required to perform extended temporary duty (TDY) travel at great distances from their homes and families. The questions of how often and at whose expense such employees should be permitted to return to their homes for nonworkdays have long troubled Government agencies. In this article, Mr. Higgins briefly discusses the previous methods of dealing with the problem, the difficulties that have arisen, and the Comptroller General's recent response to those difficulties.

—Eds.

Background

In an early case², GAO's predecessor, the Comptroller of the Treasury, held that an employee on travel status could not be reimbursed for the cost of transportation to and from his home on Sundays or holidays, even though the amount did not exceed the probable cost of subsistence expenses if he remained at his place of temporary duty. The reason for this decision was that subsistence expenses could be incurred *only* at the place of temporary duty. Because the employee's trips to and from his home were not considered travel on Government business, his transportation expenses would not be treated as subsistence costs.

In 1943 the Comptroller General reviewed this policy and ruled that, since employees traveling for the Government were expected to use the same care as a prudent person would exercise if traveling on personal business, an employee could voluntarily return to his official station *if his presence were not required at the temporary station and such return would cost the same or less than per diem.*³

The Federal Travel Regulations (FTR) issued by the General Services Administration—which govern travel for civilian employees of the Government—follow this 1943 decision. The regulations provide that an employee who

voluntarily returns for nonworkdays to his official station or residence may be allowed round-trip expenses, not to exceed the expenses that would have been allowable had the employee remained at his TDY station.⁴ In addition, the regulations provide that, "at the discretion of the administrative officials, a traveler may be required to return to his official station for nonworkdays." There are no monetary limitations under the latter provision, nor are there any guidelines for determining when travel on nonworkdays should be required.

The Continuing Problem

The policy of reimbursing employees for the cost of voluntarily returning home on weekends up to the per diem cost that would have been incurred at the TDY post worked well within reasonable distances from the home station. However, for longer trips, the higher cost of returning home could not be reimbursed. Consequently, employees who were required to perform extended TDY at greater distances from home were forced to choose between staying away for long periods or spending large sums of their own money to return home periodically. Both choices were unpalatable to most employees.

¹Assistant General Counsel, Civilian Personnel Matters, GAO.

²25 Comp. Dec. 944 (1919).

³B-35980, September 11, 1943.

⁴FTR Paras. 1-7.5c and 1-8.4f (May 1973).

Within GAO, this problem was most pronounced in four regional offices: Atlanta, Dallas, Denver, and, to a lesser extent, Seattle. Auditors who were required to travel for extended periods to distant sites were unhappy with the fact that they were separated from their families for several weekends at a time. Further, there was some indication that the policy adversely affected morale, which, in turn, resulted in a drop in productivity as well as a greater turnover in personnel. (The latter was attended by increases in recruiting and training costs.) Other agencies whose missions require extensive travel reported similar problems.

The New Approach

Meetings with officials of the General Services Administration revealed that agencies needed guidance on the extent to which they could authorize or require weekend return travel. As a consequence of these meetings, the Comptroller General recently issued a decision⁵ which permits the cost of authorized weekend return travel from extended temporary duty to be paid or reimbursed as a necessary travel expense, *provided that* the agency concerned has made a cost analysis and has determined that the cost of such travel is equaled or outweighed by savings in efficiency and productivity and in reduced costs of recruiting, training, and retaining employees. Of course, the authority to pay for weekend return trips is limited by the availability of appropriations for travel. The cost analysis to justify the payments should be conducted at least every 2 years. Agencies have been advised to issue appropriate guidelines

implementing their determinations to pay weekend travel costs. GAO suggested that agencies make prudent use of the new authority until such time as GSA amends the FTR to regulate this area.

Conclusion

Federal agencies now are legally permitted, on the basis of a cost analysis, to use their available travel appropriations to pay for the cost of returning employees home on weekends, subject to such restrictions and limitations as may be imposed by agency guidelines or by GSA regulations.

Within GAO, the required cost analysis is now being made and we anticipate that the weekend return travel policy will be implemented soon. The questions of how often such travel will be permitted and under what conditions are still under consideration.

The ultimate significance and ramifications of the Comptroller General's decision are, as yet, unknown. For example, we presently do not know the extent to which Federal agencies will utilize the new authority; the impact of the new policy on the cost of travel; or the effect of the decision on the morale and productivity of traveling employees. One thing is clear, however—the change from the early decisions that weekend travel is not reimbursable to the policy that agencies may pay for weekend return trips if doing so is cost-effective represents a major new breakthrough.

Should you have questions on the new policy, please feel free to contact me at 275-6410.

⁵B-130082, July 20, 1976.

APPROPRIATIONS: A BASIC LEGAL FRAMEWORK — PART I

Henry R. Wray¹

“Appropriations law” questions arise in as many contexts as there are Federal actions that depend on financing. As we are well aware, such questions form an important part of GAO’s audit and legal work. This two-part article discusses the legal attributes and uses of appropriations, as illustrated in Comptroller General decisions and other authorities. Part I presents an overview of the appropriations process under relevant constitutional and statutory provisions. Part II, which will appear in the next issue of the “Adviser,” outlines some of the major legal issues concerning the use of appropriations. —Eds.

Nature of Appropriations

The congressional appropriations power derives primarily from the Constitution, which states in part that “No money shall be drawn from the Treasury, but in consequence of appropriations made by law * * *.”² The “power of the purse” conferred by this provision has been described as—

“* * *the most important single curb in the Constitution on Presidential power. The President can always veto Congressional measures intended to curb him directly, and his veto will be effective nine times out of ten. But a President cannot do much very long without funds, and these Congress can withhold from him simply by inaction.”³

The appropriations power is also, of course, an affirmative tool which the Congress uses to establish funding levels and priorities among Federal programs in the exercise of extremely broad discretion:

“Congress in making appropriations has the power and authority not only to designate the purposes of an appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations.* * *

“The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same.* * *”⁴

The constitutional requirement for appropriation is restated in several statutory provisions. For example, subsection (a) of the “Antideficiency Act”⁵ prohibits any Government official from making an obligation or expenditure in excess of the amount available in an appropriation or from

¹Deputy Assistant General Counsel, General Government Matters, GAO.

²U.S. Const., art. I, § 9.

³Corwin, *The Constitution and What It Means Today*, 101 (13th ed., 1975).

⁴*Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff’d*, 154 F.2d 419 (9th Cir. 1946). One limit on Congress’ power to appropriate is Art. I, § 8, cl. 12 of the Constitution, which provides that no appropriation “to raise and support armies” shall be for a longer term than 2 years. However, this limitation has been narrowly construed in Attorney General opinions so as not to cover appropriations for the various means which an army uses in its operations, such as military procurement. 25 Ops. Att’y Gen. 105 (1904); 40 Ops. Att’y Gen. 555 (1948).

⁵31 U.S.C. § 665(a) (1970).

involving the Government in any obligation in advance of appropriations except as authorized by law. The Antideficiency Act and related statutes have been applied broadly to prohibit not only direct obligations in excess or in advance of appropriations, but also any other liability which may ultimately require the expenditure of public funds.⁶

“Appropriation,” “obligational authority,” and “budget authority” are similar concepts which include, in addition to direct money appropriations, statutory authority to obligate by contract (“contract authority”), to borrow from the Treasury (“borrowing authority”), or to otherwise incur an indebtedness to be liquidated with public funds. For example, the Congressional Budget and Impoundment Control Act of 1974 defines “budget authority” in part as—

“authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds* * *.”⁷

Appropriations, in this broad context, come in many forms. The authority provided is usually stated in maximum dollar amounts and for definite periods of time. However, the maximum dollar amounts specified may also be minimums, particularly under formula grant and entitlement programs, thereby affording little or no executive discretion in making the amounts available for use.⁸ Also, certain appropriations are made on a “no-year” basis (*i.e.*, “until expended”) or by permanent legislation, and are not subject to time limitations.⁹ One example of extremely broad statutory authority is the “permanent, indefinite” appropriation made by 31 U.S.C. § 724a (1970) for the payment of certain final judgments and compromise settlements against the United States of up to \$100,000. This appropriation is available for all time, and it can accommodate an almost unlimited number of judgments since it literally makes available “any money in the Treasury not otherwise appropriated* * *.”

Another form of special appropriation authority is the “continuing resolution,” which provides stop-gap funding for Federal programs and activities when regular appropriations have not been enacted prior to the start of a new fiscal year. Continuing resolutions generally provide for the continuation of programs and activities conducted during the preceding fiscal year at funding levels that do not exceed the lower of the prior year rate or the rate proposed in the President’s budget. This broad-brush approach invariably produces many problems of interpretation.¹⁰ Hopefully, the new timetables for enactment of appropriation bills, discussed in the following section, will eliminate, or at least reduce, the need for continuing resolutions.

Life Cycle of an Appropriation

Most appropriations are enacted to fund the needs of Federal agencies and programs. The following is a chronology and brief description of major features in the authorization, enactment, implementation, and expiration of appropriation acts.

Authorization. Consideration of appropriations is normally preceded by enactment of a statute, or “authorizing act,” which establishes the program or activity to be funded. This statute may recite an authorization of appropriations with reference to specific amounts and periods (*i.e.*, “there is authorized to be appropriated to carry out title I of this Act § for fiscal year 1977”); or it may be stated in general terms (“there is authorized to be appropriated to carry out title I of this Act such amounts as may be necessary”). On the other hand, the “authorization” statute may not expressly refer to appropriations at all. The existence of a statute imposing substantive functions upon an agency which require funding for their performance is itself a sufficient authorization for the necessary appropriations. For example, those statutes which prescribe GAO’s functions—the Budget and Accounting Act, 1921, the Legislative Reorganization Act of 1970, *etc.*—

⁶See, *e.g.*, 48 Comp. Gen. 497 (1969); 42 Comp. Gen. 272 (1962).

⁷31 U.S.C. § 1302(a)(2) (Supp. V, 1975). See also, the definition of “appropriation” in 31 U.S.C. § 2 (1970).

⁸See, *e.g.*, *Train v. City of New York*, 420 U.S. 35 (1975) (waste treatment construction grants); *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973) (highway construction grants).

⁹There are technical distinctions between “no-year” and “permanent” appropriations. For example, unlike a permanent appropriation, a “no-year” appropriation may cease to be available if it goes unused for 2 full years. See, 31 U.S.C. § 706 (1970).

¹⁰The following decisions illustrate some of the problems which GAO has confronted in applying continuing resolutions to particular contexts: 55 Comp. Gen. 289 (1975); B-114833, Nov. 12, 1974; B-152554, Nov. 4, 1974; B-164031(1), March 14, 1974; 53 Comp. Gen. 129 (1973); 52 Comp. Gen. 270 (1972).

constitute the only authorization for our appropriations.

The existence and adequacy of authorization statutes is significant primarily in terms of congressional requirements during the budget process. Under the rules of each House of Congress, a provision in an appropriation bill is subject to a procedural objection, or "point of order," if the proposed appropriation is not authorized or is inconsistent with the authorization statute.¹¹ However, if the appropriation is enacted into law, it has full force and effect notwithstanding any procedural objection which might have arisen during the legislative process.

The budget process. The Congressional Budget Act of 1974 establishes a comprehensive system governing the annual budget process. The system is designed to assure congressional control; provide for determination each fiscal year of an appropriate level of Federal revenues and expenditures; and set national budget priorities. The act includes timetables and mechanisms for the consideration of appropriation bills in conjunction with overall monetary limits for major functional budget categories, and it provides for their enactment by the start of the new fiscal year on October 1.¹²

The President's annual budget, submitted to the Congress under section 201 of the Budget and Accounting Act, 1921, as amended¹³, includes his proposals for appropriation amounts. The President's proposals, together with justification materials and testimony, are considered in hearings before the House and Senate Committees on Appropriations. The House Appropriations Committee initiates appropriations bills, which are first considered and passed by the House, then referred to the Senate, and ultimately enacted in the same manner as other legislation.

Apportionment, allotment, and impoundment. Once an appropriation is enacted, it is subject to those administrative procedures established by the Antideficiency Act designed to assure that the

appropriation will last over the period of its availability.¹⁴ First, appropriations made to executive branch agencies are "apportioned"—distributed in increments—by the Office of Management and Budget (OMB) on the basis of schedules submitted by the agency concerned. Amounts apportioned by OMB may be further divided and subdivided—"allotted"—by the agencies.

In apportioning appropriations, OMB is authorized to establish reserves "solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations." However, where reserves are established, or any other executive action or inaction withholds, delays, or otherwise effectively precludes the use of budget authority, the Impoundment Control Act of 1974¹⁵ requires the President to transmit a "deferral message" to Congress, for review and possible disapproval by either House.

"Lump sum" versus "line item" appropriations, and "reprogramming." Years ago, it was the practice of the Congress to write appropriation acts quite specifically by breaking down particular spending objects into a number of separate "line item" appropriations. Under this approach, each line item amount would be legally available only for the specific object described. The trend in recent years has favored the enactment of "lump sum" appropriations, which are stated in terms of broad object categories such as "salaries and expenses," "operations and maintenance," or "research and development."

In supporting requests for lump sum appropriations, agencies still present to the Appropriations Committees detailed justifications which explain how they propose to use the appropriation. For example, an agency seeking a \$10 million lump sum appropriation for research and development might identify ten \$1 million projects to be funded. The Committees are, of course, concerned with the specific uses of lump sum appropriations. Thus the hearings, committee reports, and floor

¹¹See, Rule XXI(2) of the Rules of the House of Representatives, and Rule XVI of the Standing Rules of the Senate.

¹²See generally, title III of the Act, 31 U.S.C. §§ 1321-1332 (Supp. V, 1975).

¹³31 U.S.C. § 11 (1970 & Supp. V, 1975).

¹⁴See generally, 31 U.S.C. §§ 665(c)-(g) (1970 & Supp. V, 1975).

¹⁵31 U.S.C. §§ 1401-1407 (Supp. V, 1975). The act also provides that the President may submit "rescission messages" proposing affirmative congressional action to repeal budget authority which he considers unnecessary. See, 54 Comp. Gen. 453 (1974) for a discussion of the Impoundment Control Act and GAO's functions under it; see also, the discussion of GAO's Impoundment Control Act activities in "The OGC Adviser," Vol. I, No. 1.

debates on appropriation bills may reflect disapproval of certain projects; suggest additional projects; or indicate a preference for funding projects in different amounts than proposed by the agency.

Each agency remains free, as a matter of law, to depart from its budget justifications, and congressional expressions concerning them, so long as its use of funds is within the broad scope of a lump sum appropriation and does not violate any limiting provision of the appropriation act. However, there are severe practical constraints to be considered. As the House Appropriations Committee pointed out in its report on a Defense Department appropriation bill:

"In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills."¹⁶

One means of accommodating the agency's desire for flexibility and the congressional interest in control is the development of "reprogramming" procedures, under which appropriate congressional committees are kept informed of certain departures

from budget justifications.¹⁷ These non-statutory procedures vary greatly from agency to agency both in terms of the degree of formality and the extent of committee input. In some cases, the agency is only required to notify committees of reprogramming actions already taken. However, certain reprogrammings may be subject to prior committee approval. GAO's decision in the matter of *LTV Aerospace Corporation*¹⁸ illustrates the difference between issues that go to the legal availability of appropriations and reprogrammings or analogous uses of lump sum appropriations that depart from congressional expectations at the time of appropriation but stay within the strict limits of the law.

Disposition of appropriation balances. Detailed Federal statutory provisions govern the closing and disposition of appropriation accounts.¹⁹ At the close of the time period for which a 1-year or multiple-year appropriation is available, the appropriation "expires" in the sense that it can no longer be put to new uses. The unused, or "unobligated," portion of the appropriation reverts to the general fund of the Treasury (often referred to in this context as the "Surplus Fund") or to any other source from which the appropriation came. The "obligated" balance of the appropriation—meaning that portion covered by liabilities which have not yet been paid—retains its identity for approximately 2 years. It is then transferred to an "M" account, in which are merged the obligated balances from all yearly appropriations for the same general purpose, e.g., "Operations and Maintenance-Army." The "M" account remains available indefinitely in order to liquidate obligations incurred in prior years for that purpose.

Within the general system of appropriations discussed above, we in OGC have considered numerous questions regarding particular uses of appropriated funds. Part II of this article, to appear in the next issue of the "Adviser," will address some of these questions.

¹⁶H.R. Rep. No. 93-662, 93d Cong. 1st Sess. 16 (1973).

¹⁷The term "reprogramming" as used here refers to the practice of shifting the application of funds within the scope of a lump sum appropriation. It should not be confused with the transfer of amounts from one appropriation account to another, which requires statutory authority. For a general discussion of reprogramming, see Fisher, *Presidential Spending Power*, ch. 4 (1975).

¹⁸55 Comp. Gen. 307 (1975).

¹⁹31 U.S.C. §§701-708 (1970 & Supp. V, 1975).

SO YOU CAN'T GET THOSE RECORDS?

Part II — The Government Contractor

Paul Shnitzer¹

In the prior issue of the "Adviser" (October 1976), we introduced the subject of GAO access to the records of Government agencies. In this article, Mr. Shnitzer discusses a different access problem—that dealing with Government contractors.
—Eds.

The law requires that any Government contract negotiated under the two basic procurement statutes (the Armed Services Procurement Act of 1947 and title III of the Federal Property and Administrative Services Act of 1949)—and some others—include a provision giving GAO access to any records of the contractor and his subcontractors relating to the contract or subcontract. The right continues for 3 years after final payment.

A negotiated contract for this purpose is one that is not formally advertised. So long as it is awarded under one of the applicable exceptions to the formal advertising requirement (including small business restricted advertising) the contract is "negotiated" even if the offer was simply accepted as submitted, without any discussions usually associated with negotiation.

The law does not require that the records be made available—only that the contract provide for access. To implement the statute, standard form (SF) 32, which is included in almost every Government contract for services or supplies, provides that, if the contract is negotiated and exceeds a minimum amount, the contractor agrees to give GAO access to his records and to include in his subcontracts a provision for similar GAO access to the records of his first-tier subcontractors.²

While it is unusual to find a prime contract that omits the provision, there have been cases where the contractor has not honored his commitment to provide for GAO access to subcontractor records. Since access is dependent on the subcontract provision, GAO probably could not insist on seeing the subcontractor's records if his contract with the prime contractor does not give us that right. However, the prime

contractor would have breached his obligation to provide for such access. In this kind of situation, the contracting activity should be advised, at the very least, to insure that the contractor meets his commitment to provide for GAO access to subcontractor records in the future.

The language of the SF 32 contract clause bears a good deal of resemblance to 31 U.S.C. 54 (quoted in GAO auditors' credentials) which provides for GAO access to Government agency records. However, there is a significant difference between the two provisions. As of now, GAO can sue to enforce its rights to contractor records, but not to agency records. Fortunately, we do not usually have to sue. This remedy is both expensive and time consuming.

In the one case³ in which litigation was successfully concluded, GAO finally got access to the contractor's records 6 years after the initial request. That case, while it did not definitively establish what records GAO could and could not see, did decide there were some things we clearly could see. These included the contractor's books, documents, papers, and records relating to the costs (either out- or in-house) of producing the contract items, including costs of direct material, direct labor, and overhead. The case also made clear that our right of access was *not* limited by:

1. The presence or absence of competition.
2. The matters considered or not considered in the course of negotiations preceding the contract.
3. The fact that the records of production costs could not be identified because off-the-shelf items were delivered. (In that situation, production costs for that type

¹Associate General Counsel, Procurement Law, GAO.

²41 C.F.R. §1-16.901-32.

³*Hewlett-Packard Co. v. United States*, 385 F. 2d 1013 (9th Cir. 1967), cert. den., 390 U.S. 988.

of item in the applicable time period are used.)

4. The fact that the information sought was, or was claimed to be, confidential business data.

The right of access to contractor records is a very important tool in the effective performance of GAO's job to investigate all matters relating to the disbursement and application of public funds. We take a broad view of the authority when necessary to the effective performance of that job. The Comprehensive Audit Manual⁴ makes clear that our right of access under the SF 32 contract clause is not limited to formal cost accounting records and supporting data. It also includes any underlying data on contract activities and operations that influence directly or indirectly payments to be made by the Government. Examples of this category are:

1. Cost proposals and negotiations.
2. Purchasing and subcontracting.
3. Engineering production and administration.
4. Direct and indirect costs charged or allocated to a contract.

Since the right of access is so broad, it should be used with care and restraint. It should not be used unless necessary to accomplish the specific objectives of an approved plan or work program. GAO is less likely to get

information if a contractor believes that we are conducting a "fishing expedition."

Of course, once given access, auditors should limit themselves to examination of necessary data and should make sure that it is not disseminated unless absolutely essential. Even if contractor data must be used, it should be presented in such a way as to omit details not needed to make the point. Remember, in almost every case the contractor feels that, for legitimate business reasons, he would rather keep the information to himself, and that any disclosure to his competitors will reflect adversely on his competitive position. To a great extent, GAO must rely on the contractor's cooperation, and we are most likely to get it if, by our actions, we can convince him that:

1. We look at only what we absolutely need.
2. We protect his data from unnecessary or unauthorized disclosure.
3. We present only what is necessary and even that only in a way that avoids, or at least minimizes, any competitive disadvantage to him.

Access to contractors' records is a complex, sensitive area. If you encounter obstacles, or have any questions whatever, please don't hesitate to consult OGC.

⁴Part 1, ch. 14-7.

Help Us Help You

Have any suggestions for changes, improvements or topics you would like to see in future "Advisers?"

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