



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Authority to obligate funds of Special Defense Acquisition Fund during duration of continuing resolutions

File: B-214236

Date: May 26, 1987

DIGEST

1. The Defense Security Assistance Agency is authorized to obligate funds in the Special Defense Acquisition Fund (SDAF), 22 U.S.C. § 2795-2795b, during the duration of continuing resolutions which do not contain a specific authorization provision for SDAF. The terms of the continuing resolution appropriating foreign assistance funds for fiscal year 1986, Pub. L. No. 99-103, § 101(b)(1), make SDAF funds available for obligation, notwithstanding an apparent restriction in the fiscal year 1985 Foreign Assistance and Relations Appropriation Act.

2. The funding provision for the Special Defense Acquisition Fund contained in the fiscal year 1985 Foreign Assistance and Relations Appropriations Act, Pub. L. No. 98-473, 98 Stat. 1837, 1884 (1984), was within the scope of the first fiscal year 1986 continuing resolution, Pub. L. No. 99-103, § 101(b)(1).

DECISION

This decision is in response to an August 21, 1986, request from the General Counsel, Defense Security Assistance Agency (Agency), concerning the Agency's authority to obligate funds in the Special Defense Acquisition Fund (SDAF) during the duration of the first continuing resolution for fiscal year 1986, which did not contain a specific authorization provision for SDAF. Specifically, the General Counsel asks two questions: (1) did the initial continuing resolution for fiscal year 1986 make funds available for obligation by SDAF at the current rate, notwithstanding a provision in the fiscal year 1985 appropriation act concerning the future applicability of ceilings and earmarks in that act?; and, assuming the provision is inapplicable, (2) is the SDAF a project or activity as those terms are used in the continuing resolution?

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We have examined the legislation and its relevant history, and pertinent decisions of this Office. In addition, we obtained the informal views of the Department of State's Office of the Legal Advisor on this matter, since State shares administrative responsibility under the Arms Export Control Act, of which SDAF is a part. On the basis of our analysis of this information, we conclude that (1) the initial continuing resolution made funds available for SDAF, notwithstanding the general provision in the preceding appropriation act concerning ceilings and earmarks; and (2) SDAF is a "project or activity" for purposes of the continuing resolution. We further conclude that the Agency is authorized to, and should, obligate SDAF monies under the terms and during the duration of any continuing resolution such as that at issue here.

BACKGROUND

SPECIAL DEFENSE ACQUISITION FUND

The provisions establishing the SDAF were added to the Arms Export Control Act by § 108(a) of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1522 (1981), codified at 22 U.S.C. §§ 2795-2795b. The SDAF is a revolving fund used to permit the procurement of services and materiel "in advance of foreign orders to enhance the President's ability to fulfill urgent requirements of allied and friendly nations while minimizing adverse impacts on the readiness of U.S. forces." S. Rep. No. 83, 97th Cong., 1st Sess. 14. 22 U.S.C. § 2795(a)(1).

The size of the Fund, currently \$900 million, is prescribed by 10 U.S.C. § 138(g), and the amounts contained in it "shall be available for obligation in any fiscal year only to such extent or in such amounts as are provided in advance in appropriation acts." 22 U.S.C. § 2795(c)(2).

APPROPRIATIONS LAWS

Public Law 98-473, a joint resolution "Making continuing appropriations for the fiscal year 1985, and for other purposes," enacted the Foreign Assistance and Related Programs Appropriations Act, 1985, 98 Stat. 1884-1903. This Act contains two provisions relevant to the issues before us: a "limitation on obligations," which by its

terms authorizes \$325 million to be made available for SDAF for fiscal year 1985, 98 Stat. at 1895, and a general provision which states:

"Ceilings and earmarks contained in this Act shall not be applicable to funds or authorities appropriated or otherwise made available by any subsequent act unless such act specifically so directs." § 538, 98 Stat. at 1902. ^{1/}

The first fiscal year 1986 continuing resolution states, with respect to foreign assistance appropriations:

"(b)(1) Such amounts as may be necessary for projects or activities, not otherwise provided for in this joint resolution, which were conducted in the fiscal year 1985, under the current terms and conditions and at a rate for operations not in excess of the current rate, for which provision was made in the following appropriation Acts:

"Foreign Assistance and Related Programs Appropriations Act, 1985;"

Pub. L. No. 99-103, § 101(b)(1), 99 Stat. 471, 472.

DISCUSSION

APPLICABILITY OF SECTION 538

The General Counsel has concluded that the Agency was prohibited from obligating SDAF funds under the first fiscal year 1986 continuing resolution. In his view, the funding level for SDAF contained in the fiscal year 1985 appropriation act was a "ceiling." Thus, under section 538, this funding ceiling could not be applied under the first fiscal year 1986 continuing resolution because the resolution did not specifically

^{1/} An identical provision is contained in § 534 of the fiscal year 1986 Foreign Assistance Appropriation Act, Pub. L. No. 99-190, 99 Stat. 1195, 1308 (1985). For simplicity, we shall refer only to § 538.

direct that it be done. It is his opinion, therefore, that no funds were available for SDAF obligations in fiscal year 1986 until a specific SDAF authorization was enacted.

As noted previously, the fiscal year 1985 Foreign Assistance Appropriations Act contains, in section 538, a general provision which makes ceilings and earmarks for funds in that Act inapplicable to funds made available in subsequent acts, unless the subsequent law specifically provides otherwise. 98 Stat. 1902. In our view, however, contrary to that of the General Counsel, the SDAF funding provision in the 1985 act, *id.*, at 98 Stat. 1985, was not a "ceiling" as that term is used in section 538. The provision was a straightforward authorization of a lump-sum to be made available for SDAF obligations from the revolving fund established by 22 U.S.C. § 2795(a). There were no directions or limitations as to how the \$325 million lump-sum was to be applied. In addition to SDAF, the annual Foreign Assistance Appropriations Act usually contains several large appropriations with designated amounts for certain countries or programs (earmarks) and maximum amounts for others (ceilings). In our opinion, it is to these individual country or program earmarks and ceilings that section 538 applies. Therefore, section 538 does not apply to SDAF obligations.

To test our interpretation, we examined the legislative history of the fiscal year 1985 Foreign Assistance Appropriations Act to determine the intent of Congress in enacting section 538. We found no relevant history with regard to the purpose of section 538, which first appears as a general provision in this statute. Provisions referring specifically to earmarks and ceilings have, however, appeared in prior foreign assistance appropriations legislation. For example, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 965 (1983), indicated that the earmarks and ceilings contained in fiscal year 1983 statutes did not apply to the appropriations for fiscal year 1984. This statute then enumerated a new set of earmarks and ceilings applicable to programs and countries for fiscal year 1984.

On the basis of this and other similar statutes, it appears that the Congress in enacting appropriations for foreign assistance programs chooses to exercise flexibility in establishing earmarks and ceilings from one year and one funding statute to another. Viewed in this light, section 538 appears to limit foreign country

earmarks and ceilings to the appropriation act in which they were designated, preventing them from accidentally being imposed in subsequent statutes. We found no support for the General Counsel's reading of this section, which in effect refuses to apply a prior year funding level even when required by the terms of a continuing resolution.

We discussed this provision informally with the State Department's Office of the Legal Advisor, which is familiar with the history of section 538, since State administers foreign assistance legislation, including the statute containing SDAF provisions. That office advised us that section 538 was added to the fiscal year 1985 appropriation act to make it clear that the Congress may amend individual foreign-country earmarks and ceilings in subsequent supplemental appropriations. The provision was not intended to restrict the applicability of continuing resolutions for succeeding fiscal years. Apparently, the more general effect inferred by the General Counsel was not considered.

The SDAF provision is not a foreign country earmark or ceiling of the type obviously meant to be covered by section 538. We conclude, therefore, that section 538 does not apply to SDAF, and does not prohibit the obligation of SDAF funds under an initial, short-term continuing resolution like Public Law 99-103, supra. On the contrary, the continuing resolution is an appropriation act providing SDAF funding authority in advance, as required by 22 U.S.C. § 2795(c).

EFFECT OF CONTINUING RESOLUTIONS ON SDAF OBLIGATING AUTHORITY

The Agency's second question is whether the SDAF funding provision in the fiscal year 1985 appropriation act falls within the category of "projects and activities" as used in § 101(b)(1) of Public Law 99-103, supra. In brief, this paragraph provides funding for the first few months of fiscal year 1986 for projects and activities conducted in fiscal year 1985, "under the current terms and conditions and at a rate for operations not in excess of the current rate, for which provision was made" in the fiscal year 1985 Foreign Assistance Appropriation Act. As discussed previously, SDAF monies are used to implement the statutory acquisition and transfer program established in 22 U.S.C. § 2795. The funding level or obligating authority of the SDAF program for

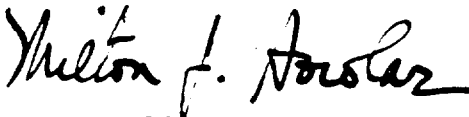
fiscal year 1985 was provided in the fiscal year 1985 appropriation act. In our opinion, the SDAF program is a project or activity conducted in fiscal year 1985, the funding conditions and rate of operations of which were provided by the fiscal year 1985 appropriation act. As a result, the SDAF provision is within the scope of § 101(b)(1).

On the advice of its General Counsel, however, the Agency did not obligate SDAF funds under this continuing resolution and others. Its real concern here appears to be that the language of the continuing resolution does not authorize release of SDAF funds in the absence of a specific SDAF funding provision.

In our opinion, the Agency is applying an overly restrictive reading of the terms of the continuing resolution. We have stated in previous decisions that continuing resolutions are intended by the Congress to be stop-gap measures to keep existing Federal programs functioning in the absence of regular appropriation acts, 58 Comp. Gen. 530, 532 (1979). Certainly with respect to short-term resolutions, this statement is still valid. To make this intent effective, the Congress establishes temporary funding for the new fiscal year based on several funding formulas, including the one at issue here which is based on the total funds available for obligation in the prior year. E.g., 58 Comp. Gen. supra, at 533.

In summary, in the fiscal year 1985 appropriation act, the Congress provided SDAF with obligating authority for that fiscal year. In the terminology of § 101(b)(1), "provision was made" for SDAF for the first months of fiscal year 1986 at the current or fiscal year 1985 level. This amounts to an appropriation of a determinable sum of money. It is not a "cap" or spending limit on what would otherwise be an untrammelled lump-sum appropriation. But for the specified level of funds provided in each fiscal year's appropriations, the Agency would be unable to obligate any of the funds in its revolving fund for SDAF purposes. We believe that the General Counsel confused the annual establishment of a level of funding authority from the SDAF revolving fund with the type of "ceilings" or "earmarks" frequently found in annual Foreign Assistance Appropriations Acts which serve to limit or carve out a portion of a

larger appropriation for a specific country or program. We therefore find that the obligation of SDAF funds was erroneously restricted while the fiscal year 1986 continuing resolution was in effect.

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