



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Funding for Army Repair Projects

File: B-272191

Date: November 4, 1997

DIGEST

1. The Army was not required to make an election between two appropriation accounts available for major repair and minor construction projects during fiscal year 1993, because Congress specifically authorized the use of both accounts for such projects in section 301 of Public Law 103-35.
2. Section 301 of Public Law 103-35, 107 Stat. 97, 103 (May 31, 1993), authorized the Army to use its FY 1993 O&M funds in addition to amounts appropriated for real property maintenance, Defense (RPM,D), fiscal years 1993-94, to carry out major repair or minor construction projects. In fiscal year 1994, the Army deobligated amounts charged to the RPM,D appropriation and obligated those amounts to the expired fiscal year 1993 O&M appropriation. Since those obligations, in fact, were incurred in fiscal year 1993, did not exceed the unobligated balance of the expired appropriation, represented a bona fide need of fiscal year 1993, and could have been charged to O&M at the time they were incurred, and since unobligated balances in expired accounts remain available for "recording . . . obligations properly chargeable to [the FY 93 O&M] account," 31 U.S.C. § 1553(a), we have no objection to Army's adjustment of the accounts.

DECISION

The Deputy Chief of Staff, Resource Management, Department of the Army, a certifying officer, requested our opinion regarding the funding for Army real property maintenance and repair projects in Europe during fiscal year 1993. The request stemmed from a draft audit report entitled "Funding for Army Facility Maintenance and Repair Projects in Europe" (Report), issued by the Inspector General (IG), Department of Defense, dated February 8, 1996. The IG reported that after the end of fiscal year 1993, the Army, asserting authority under 31 U.S.C. § 1553(a), deobligated about \$20.4 million that it had properly charged for fiscal year 1993 projects to the fiscal year 1993-94 Real Property Maintenance, Defense (RPM,D) appropriation and obligated this amount against the fiscal year 1993 Operation and Maintenance, Army (O&M) appropriation. By using unobligated balances of FY 1993 O&M funds to cover amounts originally charged to the two-year RPM,D funds, the Army freed up RPM,D funds for new obligations. The

Inspector General questioned the Army's actions, noting that under 31 U.S.C. § 1553(a), the Army's O&M appropriation, after its expiration at the end of fiscal year 1993, was "available [only] for recording, adjusting, and liquidating obligations properly chargeable to that account." The IG argues that substituting O&M funds for RPM,D funds after the end of the fiscal year was not an authorized "adjustment" under the statute. The certifying officer, however, argues that "the substitution directly furthered Congress' intent in enacting Public Law No. 103-35, . . . which expressly authorized the Army to use FY 93 [O&M] funds in addition to RPM,D funds for major repair and minor construction projects." For the reasons discussed below, we do not object to the Army's use of the expired fiscal year 1993 O&M funds in this manner.

Background

In the Department of Defense Appropriations Act for fiscal year 1992, the Congress, for the first time, appropriated \$500,000,000, available until September 30, 1993 (a two-year appropriation), for Real Property Maintenance, Defense, to finance maintenance and repair projects. Pub. L. No 102-172, 105 Stat. 1150, 1159 (Nov. 26, 1991). In the Department of Defense Appropriations Act for fiscal year 1993, the Congress appropriated additional funds, \$507,962,000, for RPM,D. Pub. L. No. 102-396, 106 Stat. 1876, 1885 (Oct. 6, 1992). These funds were also a two-year appropriation, available until September 30, 1994. Congress routinely appropriates annual funds to the Army to cover Operations and Maintenance (O&M) expenses. In the fiscal year 1993 DOD Appropriations Act, Congress appropriated over \$13 billion to the Army's O&M account, available for obligation until September 30, 1993. The fiscal years 1993-94 RPM,D appropriation and the fiscal year 1993 O&M appropriation are at issue here.

Until enactment in 1992 of the first RPM,D appropriation, the military departments had used their O&M appropriations to finance maintenance and repair projects. With enactment of the RPM,D appropriation, a question arose concerning the continued availability of O&M for this purpose. In November 1992, shortly after enactment of the 1993 Defense Appropriations Act, the Comptroller, Department of Defense (DOD), concluded that the RPM,D appropriation was the only appropriation available for real property major repair and minor construction projects. Memorandum from DOD's Associate Deputy General Counsel, Feb. 10, 1995 at 1 (Memorandum). In response, on May 31, 1993, the Congress enacted section 301 of Public Law 103-35. Section 301 of Public Law 103-35 provides:

"In addition to using the funds specifically appropriated for real property maintenance under the heading "REAL PROPERTY MAINTENANCE, DEFENSE" in title II of the Department of Defense Appropriations Act, 1993 . . . the Secretary of Defense and the Secretary of a military department may also use funds appropriated to

the Secretary concerned for operation and maintenance under any of the first 11 headings of such title in order to carry out a major repair project that costs \$15,000 or more or a minor construction project that costs not less than \$15,000 and not more than \$300,000."

107 Stat. 97, 103.¹

By the closing months of fiscal year 1994, the Army had obligated virtually all of its fiscal years 1993-94 RPM,D funds, although it had not yet funded some planned repair projects. Memorandum at 2. However, the Army still had a substantial amount of unobligated but expired fiscal year 1993 O&M funds. To accommodate the remaining unfunded projects, the Army deobligated about \$20.4 million of fiscal year 1993-94 RPM,D funds that had been obligated for projects in fiscal year 1993, and obligated the same amount to the expired fiscal year 1993 O&M funds. By substituting fiscal year 1993 O&M funds, the Army covered its fiscal year 1993 projects with adequate budget authority and freed up a corresponding amount in the RPM,D account to support new obligations. "The freed-up FY 1993 funds were then used to fund previously unfunded [Army] maintenance and repair projects." Report at 4.

The Army asserts that its actions were authorized under 31 U.S.C. § 1553(a). According to the Army, while the unobligated expired fiscal year 1993 O&M funds were no longer available for new obligations, they remained available to make "legitimate obligation adjustments" to the Army's accounting records. Because section 301 of Public Law 103-35 made the fiscal year 1993 O&M appropriation available during fiscal year 1993 for these projects, the Army contends that adjusting its accounting records for the cost of the projects by deobligating the RPM,D appropriation and obligating the corresponding amount to O&M was simply a "legitimate obligation adjustment" under section 1553(a).

The IG agrees that section 301 of Public Law 103-35 made the fiscal year 1993 O&M appropriation available for repair projects. However, the IG views the Army's action as improper on two grounds. First, relying on prior decisions of this Office, the IG contends that when two appropriations are available for the same purpose, the agency must select which to use, and that once it has made an election, the agency may not use the other appropriation even if it depletes the budget authority

¹The Army's Operation and Maintenance appropriation account falls under the "first 11 headings" of title II of the Department of Defense Appropriations Act, 1993. 106 Stat. 1878. Hereafter, when we refer to maintenance projects undertaken with funds appropriated under this law, we are referring to a repair project costing \$15,000 or more or a minor construction project costing between \$15,000 and \$300,000.

available in the appropriation selected. See 68 Comp. Gen. 337 (1989); 59 Comp. Gen. 518 (1980). Since the Army selected the RPM,D appropriation for the projects at issue, the IG believes that the Army could not later use the O&M appropriation to secure additional funds. "Once the Army chose [RPM,D] funds for a project, that election became binding for future actions on that contract." Report at 7.

Second, the IG does not view section 1553(a) as authority for the Army's adjustments. The IG argues that "while funds may be deobligated for several valid reasons, where the purpose of the action is merely to make the funds available for new obligations, such deobligation is improper." Id. As stated in his Report, the IG concludes that the Army's action did not constitute a proper adjustment under section 1553(a) because it was not taken to correct unrecorded or underrecorded obligations, nor to adjust the account to reflect what actually occurred during the fiscal year. "The fund substitution was not done for an accepted reason; rather the actions were taken to make available . . . funds that were still within their period of obligational availability." Id.

Discussion

The IG has raised two issues. First, was the Army required to make an election between RPM,D and O&M for funding repair projects. Second, does the deobligation of amounts charged to the fiscal year 1993-94 RPM,D appropriation and the obligation of those amounts to the expired fiscal year 1993 O&M appropriation constitute a legitimate obligation adjustment under section 1553(a).

A.

As the IG pointed out in his report, we have held that where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditure in question. Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency, at the beginning of the fiscal year, informs the Congress of its intent to change for the next fiscal year. See Unsubstantiated DOE Travel Payments, GAO/RCED-96-58R, Dec. 28, 1995. See also 68 Comp. Gen. 337 (1989). Once the agency has made its election, it cannot change to the second appropriation during the course of the fiscal year if funds in the first appropriation become insufficient. See 59 Comp. Gen. 528 (1980). Section 301 of Public Law 103-35, however, did not force Army to make an election, because the law clearly authorized the Army to use its O&M appropriation to supplement the RPM,D appropriation.

The difficulty with the IG's position is that the fiscal law principles cited by the IG do not apply to the present situation. The reason is straightforward--section 301 of Public Law 103-35. The language of the law makes clear that Congress intended that the "funds appropriated to the Secretary [of the Army] for operation and

maintenance" in the FY 1993 Defense Appropriations Act are "[i]n addition to . . . the funds specifically appropriated for real property maintenance under the heading [RPM,D]" in that appropriation act.² The very purpose of section 301 runs counter to the purpose of the decisions relied on by the IG, namely, by requiring an election to limit available budget authority to a specified amount for a particular purpose. Hence to require the Army to elect RPM,D or O&M for funding repair projects would defeat the purpose of section 301 to supplement the amount of funds available to the military departments for real property repair and maintenance projects in fiscal year 1993 by making O&M funds available "in addition to using the funds specifically appropriated for real property maintenance under the heading 'Real Property Maintenance, Defense'." Pub. L. No. 100-35, sec. 301. Accordingly, section 301 of Public Law 103-35 did not require the Army to make an election between the fiscal year 1993-1994 RPM,D and fiscal year 1993 O&M appropriation accounts for funding repair projects.

B.

The IG also questions the Army's position that 31 U.S.C. § 1553(a) authorized it to deobligate fiscal years 1993-94 RPM,D appropriations and charge expired fiscal year 1993 O&M appropriations. Upon expiration of a fixed period appropriation account (e.g., fiscal year 1993 O&M appropriation), the obligated and unobligated balances

²The legislative history of the fiscal year 1992-93 RPM,D appropriation indicates that the Congress had intended, by establishing an account specifically for this purpose, to impose a higher priority on repair projects than they were receiving when funded by the O&M appropriation:

"The conferees take this action because of their continuing frustration with the services' repeated attempts to use real property maintenance funds for other purposes after having justified to the committee the high priority need for such funds."

H.R. Rep. No. 102-328, at 51 (1991). See also H.R. Rep. No. 102-95, at 7. Consequently, when the Comptroller announced that because of the specificity of the RPM,D appropriation, O&M funds were no longer available for repair projects, the Congress enacted section 301 of Public Law 103-35 to ensure funding for these priority projects. According to the Report of the Armed Services Committee accompanying this law, section 301 of the law would fix the "unintended restriction of funding sources" imposed on the military departments by the Comptroller's interpretation of the fiscal year 1993 Department of Defense Appropriations Act. H.R. Rep. No. 103-83, at 7 (1993). It would correct a "defect in the language of the Department of Defense Appropriations Act for Fiscal Year 1993 concerning the use of funds for real property repair and construction projects." *Id.* at 8.

retain their fiscal year identity in an "expired account" for an additional five fiscal years, after which time the obligated and unobligated balances in the appropriation account are canceled and the appropriation is closed. 31 U.S.C. § 1552(a). During the five-year expired period, the appropriation is no longer available for new obligations, but remains "available for recording, adjusting, and liquidating obligations properly chargeable to that account." 31 U.S.C. § 1553(a).

At the time the Army adjusted the appropriations accounts, the Army clearly had not incurred a new obligation. An agency incurs an obligation whenever it incurs "a definite commitment which creates a legal liability of the government for the payment of appropriated funds." B-116795, June 18, 1950. The Army had already incurred the obligations, or legal liability, for the projects that it shifted to the expired fiscal year 1993 O&M appropriation. Whether that appropriation is available, then, turns on whether the obligations are "properly chargeable" to that appropriation under 31 U.S.C. § 1553(a).

The IG concluded that the obligations were not properly chargeable to the fiscal year 1993 O&M funds because the Army's action "did not correct unrecorded or underrecorded obligations, nor did it adjust the account to reflect what actually occurred during the fiscal year." Report at 7. Ordinarily, because any particular obligation is chargeable to only one appropriation, any account adjustment during the five-year expired period of that appropriation is likely necessitated by a factual finding that the obligational records of the appropriation do not "reflect what actually occurred" during the period of the appropriation's availability. A typical example is where an obligation, properly incurred during the period of availability, had been underrecorded or not recorded at all. The situation at issue here, however, is somewhat out of the ordinary because few agencies can draw on two different appropriations to finance the same activity, as the Army was able to do here. Further complicating the matter is the fact that one appropriation was a two-year appropriation and the other a fiscal year appropriation.

We think the IG's objection to the Army's actions fails to properly recognize the flexibility that the Congress provided the Army by virtue of section 301 of Public Law 103-35. As discussed above, the Army, in fiscal year 1993, could have obligated either fiscal years 1993-94 RPM,D or fiscal year 1993 O&M appropriation for repair projects. Had the Army been required to choose between fiscal years 1993-94 RPM,D and fiscal year 1993 O&M, as the IG argues, the Army's choice of RPM,D would have foreclosed the availability of the O&M appropriation for this purpose. It is clear, however, that the fiscal year 1993 projects that the Army initially charged to RPM,D could have been charged, at the time of obligation, to O&M. Had the Army charged these projects to O&M, the expired fiscal year 1993 O&M appropriation, of course, would be available under section 1553(a) to liquidate the obligations, and the Army could use the unobligated balance of the expired appropriation to adjust the obligations for project modifications or cost overruns.

It is just as clear that the Army, prior to the close of fiscal year 1993, could have shifted the obligations from RPM,D to O&M in order to maximize its flexibility and take full advantage of the budget authority available to it.³

The question as to whether these obligations were "properly chargeable" to the expired fiscal year 1993 O&M appropriation hinges upon whether these obligations meet the time, purpose, and amount requirements imposed on the fiscal year 1993 O&M appropriation. See 73 Comp. Gen. 338 (1994); B-265901, Oct. 17, 1997. The Congress has provided that expired appropriations remain available for, among other things, "recording . . . obligations properly chargeable" to that appropriation. The House Committee on Government Operations explained:

"Obligations are 'properly chargeable' to an expired account when they reflect 'bona fide needs' of the period of availability of the expired account . . . and meet other requirements set forth in statutes and Comptroller General and court decisions for obligations of appropriated funds."

H.R. Rep. No. 101-898, at 7.

Because the Army, in fact, incurred these obligations during fiscal year 1993 and they represent "bona fide needs" of the period of availability, they satisfy the time restriction of the fiscal year 1993 O&M appropriation. The fiscal year 1993 O&M

³Relying on our Principles of Federal Appropriations Law (2d ed., Dec. 1992) (PFAL), the IG criticized the Army's actions on the ground that "while funds may be deobligated for several valid reasons, where the purpose of the action is merely to make the funds available for new obligations, such deobligation is improper." Report at 7. The concerns expressed in PFAL at page 7-52 about deobligating funds to make them available for new obligations arose in a different context. The discussion referred to by the IG relates to the situation where a government check, issued in payment of a valid obligation, was not promptly negotiated, and the agency if it cancels the check, deobligates the funds and obligates the funds for some other use while remaining legally liable to the payee for the underlying commitment, risks violating the Antideficiency Act. The Antideficiency Act violation would occur if the payee, subsequent to the deobligation, demands payment but no funds remain to support the payment. See 15 Comp. Gen. 489 (1935); A-44024, Sept. 21, 1942. There is no indication that the Army risked overobligating either of its appropriations. There is no objection in law to an agency fully using its budget authority so long as it satisfies any restrictions imposed on its use of the budget authority, and we normally would expect an agency to make its budget authority fully available for obligation. See, e.g., Impoundment Control Act of 1974, 2 U.S.C. §§ 683, 684(a).

appropriation was also available for this purpose by virtue of section 301 of Public Law 103-35. Additionally, no question has been raised as to whether there was adequate budget authority available in the fiscal year 1993 O&M appropriation to cover these obligations; indeed, it was for that reason that the Army shifted these obligations from RPM,D to O&M. We conclude that these obligations are "properly chargeable" to the expired account, and that the Army, acting under 31 U.S.C. § 1553(a) and taking advantage of the flexibility afforded it by Public Law 103-35, can charge these obligations for major repair and minor construction projects to the expired fiscal year 1993 O&M appropriation.

Robert Murphy
Comptroller General
of the United States