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United States Government Accountability Office
Washington, DC 20548

B-320091

July 23, 2010

Congressional Requesters

Subject: *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*

In a letter dated March 12, 2010, you requested information and our views on whether the National Aeronautics and Space Administration (NASA) complied with the Impoundment Control Act of 1974 and with restrictions in the fiscal year 2010 Exploration appropriation when NASA took certain actions pertaining to the Constellation program. Your letter asked us (1) for information regarding the planning activities of NASA staff after the President submitted his fiscal year 2011 budget request; (2) whether NASA complied with the provision in the Exploration appropriation which prohibits the use of the Exploration appropriation to “create or initiate a new program, project or activity;” (3) whether NASA has obligated Exploration appropriations in a manner consistent with the Impoundment Control Act; and (4) whether NASA complied with the provision in the Exploration appropriation which prohibits the use of the Exploration appropriation for “the termination or elimination of any program, project or activity of the architecture for the Constellation program.”

We responded to your first two questions in a previous letter. B-319488, May 21, 2010. In that letter, we provided information on planning activities and determined that NASA had not violated the provision in the Exploration appropriation that bars NASA from using the Exploration appropriation to “create or initiate a new program, project or activity.” *Id.* This letter responds to your third and fourth questions. In addition, we address questions raised by your staff subsequent to your letter regarding potential contract termination costs. As explained below, we conclude that, to date, NASA has not violated the Impoundment Control Act or the provision in the Exploration appropriation which bars NASA from using the Exploration appropriation for the “termination or elimination of any program, project or activity of the architecture for the Constellation program.” NASA has not withheld Exploration funds from obligation and has obligated the funds at rates comparable to the rates of obligation in years in which NASA obligated nearly all available Exploration funds. In addition, NASA has obligated Exploration funds to carry out the various Constellation programs, projects, and activities.

Our practice when rendering decisions is to obtain the views of the relevant agency and to establish a factual record on the subject matter of the request. GAO,

Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. By letter of April 26, 2010, the NASA General Counsel supplied NASA's legal views supporting its actions related to the Constellation program as well as relevant information. Letter from General Counsel, NASA, to Assistant General Counsel for Budget Issues, GAO (NASA Letter). We interviewed NASA officials from the Exploration Systems Mission Directorate, the Office of General Counsel, the Office of Procurement, Johnson Space Center, and Marshall Space Flight Center regarding NASA's obligation and contracting practices. We reviewed relevant financial data and contract documents and internal NASA correspondence as well as correspondence between NASA and its contractors. We also interviewed officials of firms operating under contracts with NASA.

BACKGROUND

The primary objective of the Constellation program is to develop capabilities to transport humans to Earth orbit, to the Moon, and back to Earth. The program also serves as a stepping-stone to future human exploration of Mars and other destinations.¹ On February 1, 2010, the President submitted his fiscal year 2011 budget request, which proposed the cancellation of Constellation in favor of the creation of a different approach to human space exploration.²

Prior to the submission of the President's fiscal year 2011 budget request, Congress enacted the fiscal year 2010 Exploration appropriation, which appropriated about \$3.7 billion for "exploration research and development activities." The appropriation made the funds available until September 30, 2011, with the following limitation:

"Provided, That notwithstanding section 505 of this Act, none of the funds provided herein and from prior years that remain available for obligation during fiscal year 2010 shall be available for the termination or elimination of any program, project or activity of the architecture for the Constellation program nor shall such funds be available to create or initiate a new program, project or activity, unless such program termination, elimination, creation, or initiation is provided in subsequent appropriations Acts."

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, div. B, title III, 123 Stat. 3034, 3113, 3143 (Dec. 16, 2009).

¹ For a description of the objectives of the Constellation program, see NASA, *Fiscal Year 2010 Budget Estimates*, at EXP-3, *available at* www.nasa.gov/news/budget/FY2010.html (last visited July 14, 2010) (2010 Budget Estimates).

² *Budget of the United States Government for Fiscal Year 2011*, at 129-30, *available at* www.gpoaccess.gov/usbudget/fy11/index.html (last visited July 14, 2010).

On June 9, 2010, the NASA Administrator sent a letter to several members of Congress regarding the status of the Constellation program. Letter from Administrator, NASA, to the Honorable Pete Olson, June 9, 2010 (June 9 Letter). The letter stated that “[w]hile NASA has fully complied with the provisions of the FY 2010 Consolidated Appropriations Act, the pace of some contractual work to date has been affected by the constrained FY 2010 budget profile for the Constellation program.” *Id.* at 1. The letter then stated:

“Within this already constrained budget profile, funding for the Constellation program is further limited after taking into account estimated potential termination liability for Constellation contracts. Current estimates for potential termination liability under Constellation contracts total \$994 million. Once these termination liability estimates are accounted for, the overall Constellation program is confronting a total estimated shortfall of \$991 million for continued program effort for the balance of the year, compared with the revised FY 2010 plan. Given this estimated shortfall, the Constellation program cannot continue all of its planned FY 2010 program activities within the resources available. Under the Anti-Deficiency Act (ADA), NASA has no choice but to correct this situation. Consequently, the Constellation program has formulated an updated funding plan for the balance of FY 2010”

Id. The letter stated that “NASA intends to pace, rather than terminate, activity on the Constellation contracts,” prioritizing work to be completed in accordance with four stated principles. *Id.* at 2. The four principles are to:

- Maximize retention of personnel/skills and capabilities that can contribute to future technology development,
- Protect advanced development work that could transfer to planned programs as reflected in the FY 2011 budget request,
- Enable a robust transition to work associated with an Orion Crew Escape Vehicle that the President announced in an April 15, 2010 speech, and
- Place a low priority on expenditures for hardware that can be used solely for the program of record and are not applicable to programs as reflected in the FY 2011 budget request.

DISCUSSION

We address three issues: first, whether NASA has complied with the Impoundment Control Act of 1974; second, whether NASA has complied with the provision in the fiscal year 2010 Exploration appropriation which bars NASA from using the Exploration appropriation for the termination or elimination of any program, project, or activity (PPA) of the architecture for the Constellation program; and third, potential contract termination costs.

Impoundment Control Act of 1974

Congress enacted the Impoundment Control Act of 1974 to tighten congressional control over presidential impoundments. Among other things, the act established a procedure under which Congress could consider the merits of impoundments proposed by the President. GAO, *Impoundment Control Act: Use and Impact of Rescission Procedures*, GAO-10-320T (Washington, D.C.: Dec. 2009), at 1. An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61 (Budget Glossary). There are two types of impoundments: deferrals and proposed rescissions. *Id.* Under the act, the President may propose a rescission when he wishes to withhold funds from obligation permanently or submit a deferral proposal when he wishes to withhold funds temporarily. Agencies may withhold budget authority from obligation only if the President has first transmitted a rescission or deferral proposal in a special message to Congress. 2 U.S.C. §§ 683(a), 684(a); *see also* B-308011, Aug. 4, 2006; B-307122, Mar. 2, 2006.

The President has not transmitted a rescission or deferral proposal to Congress pertaining to NASA or the Exploration appropriation. Therefore, NASA may not withhold funds in the Exploration account from obligation. Throughout this fiscal year, NASA has obligated amounts available in the Exploration appropriation at rates comparable to those in preceding years. According to NASA financial data, by June 30, 2010, NASA had obligated 83 percent of the Exploration funds that Congress appropriated for fiscal year 2010. By comparison, the corresponding figure in fiscal years 2009 and 2008 was 73 percent. If NASA continues to obligate funds at its current rate, it will obligate nearly all the funds available in the Exploration appropriation before the end of this fiscal year, just as NASA obligated nearly all the available funds by the end of fiscal years 2009 and 2008. Because the funds appropriated this fiscal year will be available until the end of fiscal year 2011, it is likely that NASA will obligate nearly all available amounts well before the funds expire.³

We previously found that an agency violated the Impoundment Control Act when it withheld funds from obligation in response to a legislative proposal that appeared in the President's budget request. B-308011, Aug. 4, 2006. In that case, the agency's apportionment schedule for the appropriation identified over \$2 million set aside in reserve, unavailable for obligation, pending congressional action on the President's

³ NASA's 2009 and 2008 appropriations also made the Exploration appropriation available for two fiscal years. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, div. B, title III, 123 Stat. 524, 560, 587-88 (Mar. 11, 2009); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, div. B, title III, 121 Stat. 1844, 1884, 1917 (Dec. 26, 2007). In both years, NASA obligated nearly all available amounts by the end of the first fiscal year of availability.

budget request. In this case, however, we see no evidence that NASA has withheld funds from obligation. NASA has made Exploration appropriations available to program managers for obligation. Accordingly, the managers have obligated the funds at rates comparable to the rates of obligation in years in which NASA obligated nearly all the funds before the end of even the first year of availability. Therefore, we conclude that NASA has not violated the Impoundment Control Act of 1974.

Termination or Elimination of Any Program, Project, or Activity (PPA)

The next issue is whether NASA has complied with the provision in the fiscal year 2010 Exploration appropriation which bars NASA from using the Exploration appropriation “for the termination or elimination of any program, project or activity of the architecture for the Constellation program.” To interpret this provision, we begin with the statutory language. *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058 (2009); *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004); B-302548, Aug. 20, 2004. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. B-308715, Apr. 20, 2007. To identify the common, ordinary meaning of words, courts look to a standard dictionary. *Mallard v. U.S. District Court*, 490 U.S. 296, 300–02 (1989); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 237 (1990); B-308715, Apr. 20, 2007; B-302973, Oct. 6, 2004. In this case, “terminate” means “bring to an end,” while “eliminate” means “completely remove or get rid of (something).” *The New Oxford American Dictionary* 1741, 548 (2nd ed. 2005). Thus, the appropriations act prohibits NASA from using the Exploration appropriation to bring any Constellation PPA to an end, or to completely remove or get rid of any Constellation PPA.⁴

A “Program, Project or Activity (PPA)” is an “element within a budget account. For annually appropriated accounts, the Office of Management and Budget (OMB) and agencies identify PPAs by reference to committee reports and budget justifications.”

⁴ The conference report accompanying the fiscal year 2010 Exploration appropriation stated that “funds are also not provided herein to *cancel, terminate or significantly modify contracts* related to the spacecraft architecture of the current program, unless such changes or modifications have been considered in subsequent appropriations Acts.” H.R. Rep. No. 111-366, at 756 (Dec. 8, 2009) (emphasis added). This language differs from that in the statute, which prohibits NASA from using Exploration funds for the “termination or elimination of any *program, project or activity* of the architecture for the Constellation program” (emphasis added). Language in a conference report is part of the statute’s legislative history and is therefore not legally binding. Although courts sometimes turn to legislative history to resolve questions of statutory interpretation when the statutory text is unclear, courts do not “resort to legislative history to cloud a statutory text that is clear.” *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994); *see also, e.g., 14 Penn Plaza v. Pyett*, ___ U.S. ___, 129 S. Ct. 1456, 1465 (2009); *Shannon v. United States*, 512 U.S. 573, 583 (1994); 55 Comp. Gen. 307, 325 (1975). In this case, because the meaning of the language in the fiscal year 2010 Exploration appropriation is clear from the text of the statute, we do not refer to the statute’s legislative history to aid our interpretation.

Budget Glossary, at 80. NASA's fiscal year 2010 budget request lists five PPAs within the "Constellation Systems" category:

- Program Integration and Operations,
- Orion Crew Exploration Vehicle,
- Ares I Crew Launch Vehicle,
- Ares V Cargo Launch Vehicle, and
- Commercial Crew and Cargo.

2010 Budget Estimates, at EXP-2.

As discussed above, NASA has continued to obligate Exploration appropriations to all five of these PPAs, notwithstanding the President's proposal in his fiscal year 2011 budget submission; in fact, NASA's current rate of obligation is comparable to or exceeds that of the previous two fiscal years. We found no evidence that NASA is withholding Exploration appropriations from obligation in anticipation of future programmatic changes or that NASA is taking any steps to terminate or end the Constellation program, any of the six large contracts for the hardware of the Constellation program, or any of the five PPAs.

NASA financial data show that NASA has allocated funds across the Constellation PPAs (such as the Ares I and Orion programs) in amounts consistent with the allocations given in congressional committee reports and NASA's public budget documents. In continuing to obligate funds for all the various Constellation PPAs, NASA has neither brought to an end nor completely eliminated any Constellation PPA. As we discussed in our previous opinion, NASA has engaged only in preliminary planning activities related to the proposals in the President's fiscal year 2011 budget submission. B-319488, May 21, 2010. Thus, we conclude that, at this time, NASA has not violated the restriction in the fiscal year 2010 Exploration appropriation.

The June 9 Letter informs Congress that NASA will place a priority on funding work that aligns with the programs planned in the President's fiscal year 2011 budget request and with a space vehicle the President proposed in an April 15, 2010 speech. Meanwhile, NASA will "place low priority on expenditures for hardware that can be used solely for" the current program. June 9 Letter, at 2. It is not clear what NASA specifically means by "low priority." However, such shifts in priority do not in themselves amount to the termination or elimination of a PPA. NASA must coordinate many employees and contractors and multiple undertakings in order to carry out each PPA. For example, NASA divides the Ares I PPA into five "project elements," such as the First Stage, the Upper Stage engine, and the Upper Stage. 2010 Budget Estimates, at EXP-14. NASA has discretion in how it carries out the Constellation program consistent with Congress's statutory direction. In making these choices, NASA continues to obligate funds to carry out all of the Constellation PPAs. It has not diverted the Exploration funds to create or initiate a new PPA. Therefore, this course of action also does not violate the language that bars NASA

from terminating or eliminating any PPA of the architecture of the Constellation program.

The June 9 letter stated that the Ares “program will generally provide no additional funding for the first stage contract, descope remaining contracts, and reduce support contractor levels.” However, NASA has continued to obligate funds for the performance of the Ares program. There are two Ares PPAs: the Ares I Crew Launch Vehicle and the Ares V Cargo Launch Vehicle. In June of 2010, NASA obligated an additional \$222 million for the Ares I PPA, and thus has obligated \$1 billion for the PPA during this fiscal year. In addition, in June of 2010, NASA obligated an additional \$9 million for the Ares V PPA, reaching a total of \$60 million in obligations for Ares V during this fiscal year. We are also aware that NASA has decided not to proceed with some procurements and studies that had been planned but not yet awarded. NASA Letter, at 7. After making these decisions, NASA has continued to obligate funds to carry out all of the Constellation PPAs, and has not used Exploration funds to create or initiate a new PPA. Therefore, these actions do not violate the restriction in the fiscal year 2010 Exploration appropriation.

Termination Costs

Your staff has raised questions about which party bears responsibility for the contractors’ potential termination costs under the Constellation contracts because of public statements that NASA has made concerning the requirements of the Antideficiency Act. The Antideficiency Act provides that agency officials may not authorize obligations exceeding the amount available in an appropriation or before the appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1). Generally, an obligation is a “legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States.” B-300480, Apr. 9, 2003, *quoting* 42 Comp. Gen. 733, 734 (1963).

To carry out the Constellation program, NASA has entered into a multitude of contracts and other procurement instruments. NASA refers to six large contracts for the hardware of the Constellation program as the program’s prime contracts.⁵ NASA states that it has not taken any steps to terminate any of the Constellation contracts. NASA Letter, at 8; *Hearing Before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, 111th Cong. (Mar. 23, 2010) (statement of NASA Administrator).

All of the prime contracts for the Constellation program are cost-reimbursement contracts. NASA Letter, at 10; *see also, e.g.*, NASA Contract No. NNM07AA75C, at 2 (ATK Launch Systems); NASA Contract No. NNJ06TA25C, schedule A, section B, at 2

⁵ NASA entered into prime contracts with ATK Launch Systems, Lockheed Martin, Oceaneering, and Pratt & Whitney Rocketdyne. NASA entered into two separate prime contracts with Boeing.

(Lockheed Martin). In general, these types of contracts require the government to reimburse the contractor for allowable costs incurred in performing the contract, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.301-1.

Some contract termination costs are allowable under the FAR. Generally, termination costs are costs that would not have arisen had the contract not been terminated. FAR § 31.205-42. As required by the FAR, the prime contracts include a provision stating that the government is not obligated to reimburse the contractor for costs incurred in excess of the total allotment that is specified in the contract; this limitation on liability would include termination costs. FAR §§ 32.705-2(b), 52.232-22(f)(1), 52.232-22(h); *see, e.g.*, NASA Contract No. NNM07AA75C, at 33; NASA Contract No. NNJ06TA25C, schedule A, section I, at 3. This limitation on the government's liability is generally known as the "limitation of funds clause." NASA must record an obligation for the entire amount that is allotted to the contract, which represents NASA's legal liability, in order to comply with various fiscal statutes, including the Antideficiency Act.⁶

Under the limitation of funds clause, when the contractor expects that the costs it will incur in the next 60 days of performance will exceed 75 percent of the total amount allotted to the contract, the contractor must notify the agency. FAR § 52.232-22(c). Additionally, 60 days before the end of the period specified in the contract, the contractor must notify the agency of the estimated amount to continue performance under the contract or for any further period specified in the contract's schedule⁷ or

⁶ In January 2010, NASA and one of its contractors agreed to modify two of the six Constellation prime contracts to include clauses pertaining to "special termination costs." These clauses enumerated several categories of allowable termination costs and provided that "in the event of a termination for convenience, and subject to negotiation of a termination settlement, funds will be applied to cover Special Termination Costs from amounts available within the Exploration Systems Appropriation or from such other funds appropriated or to be appropriated by Congress for this purpose." NASA Contract No. NNM08AA16C, modification 34 (Boeing Avionics contract), NASA Contract No. NNM07AB03C, modification 57 (Boeing Upper Stage contract.) Further, "the Contractor agrees to perform this contract in such a manner that the Contractor's claim for special termination costs will not exceed" a particular amount (\$29 million for the Avionics contract, \$52 million for the Upper Stage contract.) *Id.* Although these two prime contracts also include the standard limitation of funds clause, the standard limitation of funds clause specifically allows the contractor and the government to agree to exceptions. FAR § 52.232-22(f). As required by law, NASA has recorded obligations corresponding to the amounts for each special termination cost clause. NASA Letter, at 12; B-238581, Oct. 31, 1990.

⁷ The contents of the schedule are specified in the FAR, §§ 14.201-1 and 15.204-1.

otherwise agreed upon. FAR § 52.232-22(d). During this and previous fiscal years, the Constellation prime contractors have sent notifications to NASA in accordance with this provision. The contractor is not obligated to continue performance, including any actions related to contract termination, if such performance would cause the contractor to incur costs in excess of the amount allotted. FAR § 52.232-22(f)(2).

The limitation of funds clause creates an incentive for contractors to accurately track both the costs of performance and any termination costs that they may incur. Because the costs that contractors might incur in the event of a termination may be considerable, many contractors consider it prudent to track their estimated termination costs and to consider the possibility of termination in the course of performance. The contractor might believe that it must incur some costs—those related to the contractor’s contractual obligations to third parties, for example—in the event of a termination. Consequently, contractors may take steps to limit their possible liability in the event of a termination. For example, an official of one NASA contractor told us that his company’s standard practice on contracts with agencies other than NASA is to incur costs only up to an amount that would leave the government agency with enough funds available under the allotted amount to reimburse any allowable termination costs that might arise. *See also* B-238581, Oct. 31, 1990 (“Consequently, as dictated by good business practice, [the contractor] kept an accounting of the unliquidated funds which were obligated on the contract so as to guarantee that sufficient amounts remained to liquidate termination costs.”).

Four of the five prime Constellation contractors told us that NASA’s past practice has been to agree to reimburse all termination costs, even if such costs exceeded the amount currently allotted to the contract under the limitation of funds clause.⁸ Some of the contractors assert NASA stated in various written and oral communications that NASA would reimburse such costs. The contractors further assert that NASA’s behavior during contract performance also indicated that NASA would reimburse such costs. These four contractors did not take steps to ensure that the funds that NASA allotted to the contract would also be sufficient to reimburse any termination costs that may arise under the contract. Instead, these contractors told us that, in the past, they would incur performance costs up to the amount that NASA had allotted to the contract, without leaving any of the allotted amount available for termination costs.

In August 2009, NASA sent a letter to one contractor which cited the limitation of funds clause and stated that—

“the Government is not obligated to reimburse [the contractor] for costs incurred in excess of the total amount allotted by the Government to this contract . . . Plainly stated, should [the contractor] expend funds

⁸ The fifth Constellation prime contractor told us that the contractor, not NASA, bears the responsibility for accounting for potential termination liability that may arise.

over and above the funds allotted to the subject contract it does so at its own risk.”

Letter from Contracting Officer, NASA, to ATK Launch Systems, Inc., *Subject: Contract NNM07AA75C, Continuing Resolution and Limitation of Funds*, Aug. 14, 2009, at 1. In response, the contractor stated that “NASA has the obligation to reimburse [the contractor] for any termination related costs incurred.” Letter from Manager, Contracts, ATK, to Marshall Space Flight Center, NASA, *Subject: Contracts NAS8-97238 and NNM07AA75C Limitation of Funds*, Sept. 10, 2009, at 1. Stating that “[t]his is the course of conduct that has been in place for many years on NASA contracts,” the contractor concluded that it “will continue to rely on NASA’s long standing course of conduct under which NASA will continue to have the obligation to provide additional funding to [the contractor] for termination related costs.” *Id.*

In March 2010, after the President submitted his fiscal year 2010 budget request, two prime contractors sent letters to NASA stating the contractors’ understanding that NASA would reimburse termination costs even if such costs exceeded the amount NASA had allotted to the contract. Letter from Manager, Contracts, ATK, to Marshall Space Flight Center, NASA, *Subject: Contract NNM07AA75C Proposed Draft Termination Liability Clause*, Mar. 10, 2010; Letter from Contracts Management, Lockheed Martin Space Systems Company, to Contracting Officer, NASA, *Subject: Contract NNJ06TA25C—Notification of Funding Expenditure Limitation*, Mar. 22, 2010. In response letters sent in April 2010, NASA stated that the contractors’ understanding “is inconsistent with written NASA Guidance⁹ and, more importantly, the contract’s Limitation of Funds clause.” Letter from Procurement Officer, NASA, to Chief, Contracts Administration, Lockheed Martin Corp., *Subject: Contract NNJ06TA25C, Project Orion, Notification of Funding Expenditure Limitation*, Apr. 23, 2010, at 1; Letter from Procurement Officer, NASA, to ATK Launch Systems, Inc., *Subject: Contract NNM07AA75C Proposed Special Termination Clause*, Apr. 23, 2010, at 1. The letters NASA sent quoted language from the limitation of funds clause stating that “the Government is not obligated to reimburse the Contractor for any costs incurred in excess of the total amount allotted by the Government to this contract, whether incurred in the course of the contract or as a result of termination.” *Id.*; FAR § 52.232-22(h).

⁹ Internal NASA memoranda state NASA policy: “absent specific Congressional or regulatory authority, the Limitation of Funds clause clearly provides that termination costs are subject to the limitation of funds amount in the contract. The maximum amount NASA would be required to pay, as a result of a contract’s termination, would be the funds obligated on the contract.” Memorandum from Associate Administrator for Procurement and from Chief Financial Officer, NASA, *Subject: Procedures for Termination Liability*, Mar. 19, 1997. *See also* Memorandum from Comptroller and from Assistant Administrator for Procurement to Center Directors, NASA, *Subject: Funding for Termination Liability*, Apr. 22, 1992; Memorandum from Associate General Counsel (Contracts) to Director, Program Operations Division, NASA, *Subject: Request for Deviation Regarding Termination Liability*, July 28, 1989.

We take no position in this opinion regarding whether NASA ever promised contractors, explicitly or implicitly, that NASA would reimburse contract termination costs even if they exceeded the total amount allotted to the contract. However, we note that if NASA were to agree to pay termination costs that exceed the total amount allotted under FAR section 52.232-22, such an agreement would be an obligating event. NASA would need to have sufficient funds available to obligate the amount that it agreed to pay; otherwise, NASA would risk violating the Antideficiency Act. *See* B-238581, Oct. 31, 1990.

Current estimates provided to NASA by the prime contractors for potential termination costs total \$994 million. June 9 Letter. NASA explained that it obligates amounts to the contracts and is not reserving these funds for termination costs; however, NASA is negotiating with the prime contractors to formulate appropriate work plans for the balance of this fiscal year. At the end of June 2010, NASA had obligated about \$3.1 billion of the \$3.7 billion that Congress appropriated for the Exploration appropriation this fiscal year. This leaves approximately \$600 million in budget authority in the Exploration account for the remainder of the fiscal year.

We recognize that progress toward meeting key Constellation milestones has slowed and that job losses have occurred.¹⁰ However, the evidence we have gathered to date indicates that NASA is adhering to its policy and the FAR terms incorporated into the Constellation prime contracts concerning allowable costs, including potential termination costs. NASA officials and financial data indicate that NASA continues to obligate funds to the prime contracts and that the obligation rates have not changed in response to either the President's budget request or to the Administrator's June 9 Letter. The agency's obligation of the amounts allotted to the Constellation prime contracts and its adherence to the terms of the FAR with regard to allowable costs help ensure NASA's compliance with the Antideficiency Act and do not constitute a violation of the provision in the fiscal year 2010 Exploration appropriation prohibiting

¹⁰ Of the five Constellation prime contractors, three contractors state that they are implementing or planning reductions in the workforces assigned to their Constellation contracts. Contractors are reassigning some staff to non-Constellation projects and are laying off other staff. Of these three contractors, one states that the changes were necessary because NASA funded the contract at a lower level than the contractor had previously expected, while another asserts that the changes were necessary because NASA changed its practice with regard to the funding of termination liability. A third contractor states that a combination of these two factors made workforce reductions necessary. Two of these three contractors also have slowed or stopped some procurements from their subcontractors.

The two remaining Constellation prime contractors state that they have not changed staffing levels on their prime contracts. However, one of these contractors also performs work for other Constellation prime contractors as a subcontractor. This contractor states that it has reduced its workforce because of reduced funding from the prime contractor.

NASA from terminating or eliminating any PPAs of the architecture for the Constellation program.

CONCLUSION

NASA's actions to date with regard to the Constellation program have not violated either the Impoundment Control Act of 1974 or the provision in the fiscal year 2010 Exploration appropriation that bars NASA from terminating or eliminating any PPAs of the architecture for the Constellation program.

We hope the information provided in this opinion is helpful to you. If you have questions, please contact Assistant General Counsel Julia Matta at (202) 512-4023 or Managing Associate General Counsel Susan A. Poling at (202) 512-2667.

Sincerely yours,

A handwritten signature in black ink that reads "Lynn H. Gibson". The signature is written in a cursive style with a large initial "L" and "G".

Lynn H. Gibson
Acting General Counsel

List of Requesters

The Honorable Robert Aderholt
The Honorable Ralph Hall
The Honorable Gene Green
The Honorable Bill Posey
The Honorable Pete Olson
The Honorable John Culberson
The Honorable Jason Chaffetz
The Honorable Parker Griffith
The Honorable Michael D. Rogers
The Honorable Kevin Brady
The Honorable Jo Bonner
The Honorable Spencer Bachus
The Honorable Steve LaTourette
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