



UNDER SECRETARY OF DEFENSE  
1100 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1100

COMPTROLLER

SEP 01 2015

The Honorable Gene Dodaro  
Comptroller General of the United States  
Washington, DC 20548

Dear Mr. Dodaro:

This letter reports a violation of the Antideficiency Act (ADA), Army case number 13-08 (enclosed), as required by 31 U.S.C. § 1351. The violation involved Fiscal Year (FY) 2011 Operation and Maintenance, Army (OMA) funds. The violation totaled \$18.8 million and occurred at Bagram Airfield (BAF), Afghanistan. In this case, the total construction project was improperly funded with OMA appropriations, instead of military construction (MILCON) appropriations. Accordingly, obligations incurred for these projects exceeded the OMA amount available for MILCON projects and resulted in a violation of 31 U.S.C. § 1341(a)(1)(A).

The obligation of \$18.8 million of OMA funds that were used to construct concrete structures called “B-Huts” to house military personnel at BAF violated both 10 U.S.C. § 2805(c)(1)(A) (herein 2805) and 31 U.S.C. § 1301, respectively. In FY 2011, section 2805 permitted the use of Operations and Maintenance (O&M) to fund an unspecified minor military construction project that would not cost more than \$750,000. With respect to the use of O&M, the Government Accountability Office (GAO) takes the position that a violation of a funding restriction in an authorizing statute (such as 2805) results in a violation of the ADA (31 U.S.C. § 1341).<sup>1</sup> The use of OMA funds to finance the B-Huts was not consistent with the authorized purpose of the appropriation and resulted in an incurable violation of the “purpose statute” (31 U.S.C. § 1301). OMA funds cannot be used to fund a major MILCON project. Under the provisions of title 10, military departments may only carry out major MILCON projects (in FY 2011, the cost exceeding \$2 million) that are specifically authorized by Congress (10 U.S.C. § 2802(a)). Once a major MILCON project is properly authorized, it must be funded from an appropriation available to pay for the cost of the project. In general, MILCON appropriations are made available for specified major MILCON projects authorized by current law, specifically those projects approved by Congress in the authorization acts for the same year as the appropriations acts. In this case, the B-Hut projects were not authorized by Congress in the FY 2011 National Defense Authorization Act (P.L. 111-383), so funds were not appropriated for the project. In GAO’s

<sup>1</sup> Although the circumstances described herein constitute a violation of 10 U.S.C. §§ 2802(a) and 2805(b), the Department of Justice (DOJ) Office of Legal Counsel (OLC) has concluded that “a violation of a statutory restriction on spending does not violate the ADA where the restriction is not ‘in an appropriation.’” See also: DOJ OLC opinion, “Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences,” April 5, 2007 (online at [http://www.justice.gov/sites/default/files/olc/opinions/2007/04/31/epa-light-refreshments13\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2007/04/31/epa-light-refreshments13_0.pdf)); and DOJ OLC letter, “Re: Whether the Federal Aviation Administration’s Finalizing and Implementing of Slot Auction Regulations Would Violate the Anti-Deficiency Act,” October 7, 2008. However, given GAO’s views to the contrary, consistent with section 145.8 of OMB Circular A-11, DoD is submitting this report in its entirety to the President, the Congress, and the Comptroller General.



view, such failure resulted in an ADA violation as no appropriated funds were made available for obligation and expenditure for the project costs.

Mr. Robert Joseph Gingras, Base Engineer for BAF, and Mr. Francis V. Reiley, Contracting Officer, were found responsible for the violation. Disciplinary action was not administered because these individuals are no longer employed by the Department of Defense. Although the information shows the base engineer intentionally split the project into several components, the violation contained no willful or knowing intent on the part of the responsible individuals to violate the ADA.

To prevent a recurrence of this type of violation, the Army issued an order that requires approval at the U.S. Forces Afghanistan level for construction projects. This approval authority was previously retained at the Regional Command level at BAF.

Identical reports are also being submitted to the President through the Director of the Office of Management and Budget, President of the Senate, and Speaker of the House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael McCord". The signature is written in a cursive style with a large, stylized "M" and "C".

Michael McCord

Enclosure:  
As stated