



United States  
General Accounting Office  
Washington, D.C. 20548

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Office of the General Counsel

B-271127.2

January 30, 1997

Mr. Winston Tabb  
Associate Librarian  
Library of Congress

Dear Mr. Tabb:

In its report on the financial statement audit of the Library of Congress for fiscal year 1995, Price Waterhouse identified an outstanding legal issue regarding the Library's retention of certain monies incident to its operation of the Cooperative Acquisitions Program. The program had an approximate ending balance on September 30, 1995, of \$1.6 million, of which approximately \$1 million was a liability representing the refund that would have been due if every participant had cancelled their requests as of the date of the ending balance. The Library asserts that the remaining \$600,000 was not a surplus but a reserve for shutdown costs to cover separation benefits for affected employees should the program close down, as well as any other unexpected contingencies. Price Waterhouse referred the issue of whether the Library should retain the \$600,000 to our Office for further development and resolution.

We obtained the Library's views on the matter. Based on our analysis of the Library's authority and applicable principles of appropriations law, the Library should deposit in the Treasury as miscellaneous receipts the monies that the Library has received incident to the Cooperative Acquisitions Program, but does not need to fulfill its responsibilities to the program participants who paid such monies.

### Background

The Cooperative Acquisitions Program evolved from two programs that began under separate authorities. In 1958, Pub. L. No. 85-931, 72 Stat. 1790, amended section 104n of the Agricultural Trade and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454, 456, to make excess foreign currencies the United States was earning from its overseas sales of surplus agricultural commodities available to the Library

for certain purposes.<sup>1</sup> Overseas offices were created to use the foreign currencies to finance programs outside the United States for, among other things, the acquisition of new books, periodicals, and other materials for the Library as well as other libraries and research centers in the United States. In 1965, Title II-C of the Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219, 1228, authorized appropriations for what became known as the National Program for Acquisitions and Cataloging (NPAC) at the Library.<sup>2</sup> Under NPAC, the Library received appropriated funds<sup>3</sup> to, among other things, acquire library materials to use for exchange or other purposes. The Library set up Regional Acquisition Centers for the purposes of carrying out NPAC. In 1976, Pub. L. No. 94-482, 90 Stat. 2081, 2090, amended the Higher Education Act to eliminate the provision authorizing appropriations to the NPAC program. Congress eliminated the provisions relating to NPAC "with the understanding that [NPAC], which has benefited users of libraries all across the country, is to be carried on by the Library of Congress." S. Rep. No. 882, 94th Cong., 2nd Sess. 8 (1976). That understanding stems from the Library assuring Congress that NPAC "can be continued under the Library's own authority and that [NPAC's] reauthorization in the Higher Education Act is no longer needed." *Id.* Congress continued for fiscal year 1977 through fiscal year 1983 to explicitly include NPAC in the Library's appropriation for salaries and expenses. Beginning with fiscal year 1984, the Library did not receive appropriated funds specifically for NPAC.

As the Library stated in its July 15, 1996, submission to our office, when the overseas field offices depleted at the end of 1987 the foreign currencies that were available for purchases for other research libraries, the Library began requiring these institutions to pay for their purchases directly<sup>4</sup>. In 1990, Pub. L. No. 101-624, 104 Stat. 3359, 3635, amended section 104n of the Agricultural Trade Development

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<sup>1</sup>Codified at 7 U.S.C. § 1704 (1958), "Use of local currency payment."

<sup>2</sup>Codified at 20 U.S.C. § 1041 (1970), "Research library resources."

<sup>3</sup>From 1966 until 1972, the Library received funding from transfers from the Department of Health, Education and Welfare for NPAC. For fiscal years 1973 through 1983, the Library directly received funds for this program as part of its appropriation for salaries and expenses.

<sup>4</sup>See also, e.g., Legislative Branch Appropriations for 1984: Hearings before a Subcomm. of the House Comm. on Appropriations, 98th Cong., 1st Sess. 346-363 (1983).

and Assistance Act by eliminating the provision regarding the use of foreign currencies for the Library's purposes.

The current program, the Cooperative Acquisitions Program, sometimes referred to as the Overseas Participant Program, is in effect a successor to the NPAC funded by appropriations and the program financed with foreign currencies. The current program funds the administration of the program with Library appropriations and the materials with payments by participating libraries. Annually, the Library identifies the services it provides to the participating libraries in its budget justification for the Library's appropriations. Over the years, as the program changed so did the Library's description in its budget justifications. Prior to fiscal year 1988, the Library included a description of the Special Foreign Currency Program under the heading "Collection and Distribution of Library Materials," as well as a description of the acquisition of foreign research materials for participating libraries through the Library's overseas offices in its explanation of "Trust Funds" financial and activities status. In fiscal years 1988 through 1995, the Library pointed out that the foreign currencies it had been using for the program were no longer available, but that the program continued through the Library's salaries and expenses appropriations. In fiscal year 1996 and thereafter, the Library described the program exclusively in its explanation of Trust Funds activities.

The Library has six overseas field offices operating the Cooperative Acquisitions Program.<sup>5</sup> Briefly, the current program operates as follows. The Library sends potential participants, usually a university or a library, a categorical listing of materials that the Library has the ability to purchase, along with the costs it will charge the participants for such materials plus their share of the program's administrative expenses. See Library of Congress Cooperative Acquisitions Programs Brochure, September, 1992. The charge for participation is broken down into both direct costs (direct materials, shipping, and binding), and indirect costs (administrative charges and overhead) based on a percentage of direct costs.<sup>6</sup> A participant will then submit to the Library a subject profile detailing its request for the Library to purchase particular collection materials on its behalf, along with a check for the appropriate amount. Upon the Library's receipt of the money

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<sup>5</sup>These overseas offices also engage in activities unrelated to the Cooperative Acquisitions Program. According to Library officials, approximately 20 percent of these overseas offices time represents work for the program.

<sup>6</sup>The Library states that it has used for the past 3 years a cost recovery model developed under contract by Price Waterhouse. The model is based on the principle of incremental cost recovery using activity-based costing to determine administrative (indirect & overhead) charges allocated to the participant program and express the amount to be recovered as a percentage of each dollar expended in direct expense for the purchase of materials.

charged, the Library deposits the money into a fund account. The program is operated through six funds, one for each of the six field offices involved. The monies associated with these six funds are deposited into one Treasury gift fund account, which also holds the Library's gift funds. Although the Library deposits the monies associated with the program into a gift fund account, there is agreement that the monies involved in this program do not represent "gifts".

## Analysis

As explained in the background, Congress clearly wanted the Library to continue to acquire Library materials abroad for other libraries and research centers notwithstanding the expiration of the underlying statutory authorities financing the program. What Congress did not address is how the Library should finance the program. Historically, Congress had financed with public funds all costs associated with the program. When the overseas field offices depleted the foreign currencies and Congress eliminated appropriations to support the program, the Library started to charge ordering institutions for acquiring the requested materials and so advised the Congress. In view of the history of the Cooperative Acquisitions Program, we do not question the Library's authority to operate and charge participants for the costs associated with operating the program. Rather, the issue is the Library's treatment of the monies it receives from the participants.

The Library asserts that the prices it charges participants in the Cooperative Acquisitions Program stem from a cost recovery model designed to determine the Library's cost in providing goods and services. Prices and costs are subject to many variables and matching them is not something that can be achieved with exact precision. It is therefore not surprising that in some years the Library may receive funds that exceed the amount needed to satisfy the purchase requests of program participants; in other years the Library may receive less than the amount needed to fulfill its responsibilities to program participants.

In the abstract, there are at least two ways to deal with such a situation. One approach would be to address each participant separately. Monies left over after paying the direct costs incurred to satisfy a participant order would be deposited in the Treasury; the Library's indirect costs would be covered by its regular salaries and expense appropriation and, should an unexpected contingency arise, a shortfall would be financed by an appropriation available for that purpose. Another approach would be to ignore individual participants and fiscal years and treat the Cooperative Acquisitions Program as a continuing, business-like operation in which all monies received are retained by the Library for all present direct and indirect costs as well as contingencies.

In operating government programs, an official or agent of the Government receiving money for the use of the Government from any source is required, absent authority

to the contrary, to deposit the money in the Treasury as miscellaneous receipts. 31 U.S.C. § 3302(b)(1994). When a program participant pays the Library to purchase materials on the participant's behalf, the Library's initial relationship to the monies received is essentially that of a bailee, *i.e.*, the Library holds the money not for the government but for the benefit of the program participant. Once the Library uses the money to pay the direct charges associated with satisfying the Library's responsibilities to the program participant, *e.g.*, purchasing the materials ordered and having them delivered to the participant, any remaining money in effect represents the portion of the price attributable to the Library's indirect costs and contingencies and as such benefits the government by reimbursing its costs. Therefore, in the words of 31 U.S.C. § 3302(b), the remaining money is "money received for the Government" to be deposited in the Treasury.

When Congress wants an agency to retain and use program receipts to pay agency expenses, it enacts legislation providing the agency the necessary authority to avoid the application of 31 U.S.C. § 3302(b), often by establishing a revolving fund. There is no statute that provides the Library with such authority. The Library has suggested no legal basis for concluding that the Cooperative Acquisitions Program is not subject to 31 U.S.C. § 3302(b), or that money the Library receives from participants that is not used to pay direct charges for participants' purchases may be retained by the Library to pay indirect costs or future contingencies.

## Conclusion

In conducting the Cooperative Acquisitions Program, the Library does not have revolving fund or similar authority exempting it from the requirements of 31 U.S.C. § 3302(b) with respect to the money it receives from program participants. Accordingly, any money the Library has received from program participants that is not needed to pay the direct charges associated with satisfying the Library's responsibilities to the participants should be deposited into the Treasury as miscellaneous receipts.<sup>7</sup> The Library should determine what portion of the current

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<sup>7</sup>This conclusion is consistent with our earlier views on the Library's use of certain gift funds in excess of its authority to accept and use gifts. Library of Congress' Revolving Trust Funds, FGMS-80-76, September 24, 1980; Financial Audit: First Audit of the Library of Congress Discloses Significant Problems, GAO/AFMD-91-13, August, 1991. In the cited audit reports we reported that absent a statute providing revolving fund authority, the Library was not authorized to set charges for goods or services provided through self-sustaining gift funds which (1) enlarge the funds beyond the scope of the donor's gifts, (2) produce revenues for other activities, or (3) create a substantial surplus. Regarding the Cooperative Acquisitions Program, the Library similarly does not have a statute authorizing a revolving fund to retain

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balance for the Cooperative Acquisitions Program is not needed to pay the direct charges and satisfy its responsibilities to program participants.

We are sending a copy of this letter to the Chair and Ranking Minority Members of the Joint Committee of the Library and Congress; House and Senate Subcommittees on the Legislative Branch, Committee on Appropriations; the House Committee on House Oversight; and the Senate Committee on Rules and Administration.

Sincerely yours,

Robert P. Murphy  
General Counsel

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<sup>7</sup>(...continued)

funds and pay Library expenses otherwise paid for with appropriated funds. As such, the Library is only authorized to accept the amount representing the direct costs of the materials and any amount exceeding the costs for the direct materials should be deposited into the Treasury.

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## **DIGEST**

The Library of Congress does not have revolving fund or similar authority in conducting its Cooperative Acquisitions Program. Accordingly, when the Library receives money from program participants in excess of the amount the Library needs to pay the direct cost associated with satisfying the Library's responsibilities to the participants, the Library must treat the excess money consistent with 31 U.S.C. § 3302(b), which requires that absent statutory authority to the contrary, money received by the government must be deposited in the Treasury as miscellaneous receipts.