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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Election Assistance Commission—Obligation of Requirements
Payments under Continuing Resolutions in Fiscal Years 2009 and 2005

File: B-318835

Date: May 14, 2010

DIGEST

In determining amounts available for obligation under continuing resolutions, agencies must consider the operations of their programs and relevant provisions of the continuing resolutions. The U.S. Election Assistance Commission (EAC) makes payments to the states once a year for requirements payments. When EAC was operating under continuing resolutions at the beginning of fiscal years 2009 and 2005, it delayed obligations until it received its regular appropriation. Funds appropriated for requirements payments under both continuing resolutions were subject to the so-called “entitlements provision” enacted in those continuing resolutions, which required activities to continue at the rate to maintain program levels under current law. Since states receive their entire requirements payment for the year in a single distribution, generally late in the fiscal year, EAC could wait to obligate funds until it had its regular appropriations for the year and still maintain its program levels. This is consistent with other provisions of the continuing resolutions, such as implementing only the most limited funding action. Thus we do not object to EAC’s actions.

DECISION

The Inspector General of the U.S. Election Assistance Commission (EAC) has requested a decision regarding whether EAC should have obligated requirements payments under 42 U.S.C. § 15401 while EAC operated under continuing resolutions at the beginning of fiscal years 2009 and 2005. Letter from Inspector General, EAC, to Acting Comptroller General, GAO, Oct. 13, 2009 (Request Letter). EAC did not obligate any amount for requirements payments during the pendency of either continuing resolution. Request Letter, at 4. As explained below, we do not object to EAC’s actions.

Our practice when rendering decisions is to obtain the views of the relevant agency 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. The Request Letter contained relevant facts and the legal views of both the Inspector General and EAC. Request Letter, at 1–5. The Request Letter also included a memorandum from the EAC Chief Financial Officer and the EAC Director of Accounting regarding the obligation of requirements payments. Request Letter, Appendix 2. EAC officials stated that the memorandum included with the Request Letter stated the legal position EAC has taken. Telephone conversation between Chief Operating Officer, EAC; Accounting Director, EAC; Chief Financial Officer, EAC; Assistant General Counsel, GAO; Two Senior Attorneys, GAO, Nov. 16, 2009.

BACKGROUND

The Help America Vote Act of 2002 (HAVA) established EAC to assist in the administration of federal elections and charged EAC with distributing payments to states under its authorized funding programs. Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002), *codified at* 42 U.S.C. §§ 15301–15545. HAVA authorizes payments to states for enumerated purposes, including meeting the requirements of Title III of HAVA. 42 U.S.C. § 15401. These payments are called “requirements payments.” *Id.* Using a statutory formula, EAC calculates the amount for the requirements payment made to each state, which depends in part upon “the total amount appropriated for requirements payments for the year.” 42 U.S.C. § 15402(a)(1).

EAC operated under a continuing resolution at the beginning of fiscal year 2009, from October 1, 2008, through March 11, 2009. Continuing Appropriations Resolution, 2009, Pub. L. No. 110-329, div. A, 122 Stat. 3574, 3574, (Sept. 30, 2008); Pub. L. No. 111-6, 123 Stat. 522 (Mar. 6, 2009). During this time, EAC operated at “a rate for operations as provided in the applicable appropriations Acts for fiscal year 2008.” Pub. L. No. 110-329, § 101. In fiscal year 2008, Congress had appropriated \$115 million for requirements payments. Financial Services and General Government Appropriations Act, 2008, Pub. L. No. 110-161, div. D, title V, 121 Stat. 1844, 1972, 1996 (Dec. 26, 2007). The regular appropriation for fiscal year 2009 provided \$100 million for requirements payments. Financial Services and General Government Appropriations Act, 2009, Pub. L. No. 111-8, div. D, title V, 123 Stat. 524, 630, 657 (Mar. 11, 2009). EAC did not obligate any funds for requirements payments while it operated under the continuing resolution at the beginning of fiscal year 2009; however, EAC did obligate \$100 million for requirements payments after the enactment of its regular appropriation. Request Letter, at 4.

EAC also operated under a continuing resolution at the beginning of fiscal year 2005, from October 1, 2004 through December 8, 2004. Pub. L. No. 108-309, 118 Stat. 1137 (Sept. 30, 2004); Pub. L. No. 108-416, 118 Stat. 2338 (Nov. 21, 2004); Pub. L. No. 108-434, 118 Stat. 2614 (Dec. 3, 2004). During this time, EAC operated at a rate for operations “not exceeding the current rate.” Pub. L. No. 108-309, § 101. In fiscal year 2004, Congress had appropriated \$1 billion for requirements payments.

Miscellaneous Appropriations and Offsets Act, 2004, Pub. L. No. 108-199, div. H, § 159, 118 Stat. 3, 434, 451 (Jan. 23, 2004). The regular appropriation for fiscal year 2005 provided no funds for requirements payments. Transportation, Treasury, Independent Agencies, and General Government Appropriations Act, 2005, Pub. L. No. 108-447, div. H, title IV, 118 Stat. 2809, 3199, 3252 (Dec. 8, 2004). In fiscal year 2005, EAC did not obligate any funds for requirements payments. Request Letter, at 4.

DISCUSSION

At issue here is whether EAC should have obligated amounts for requirements payments while it operated under continuing resolutions at the beginning of fiscal years 2009 and 2005. Both continuing resolutions appropriated funds to EAC at a rate for operations as provided in the previous fiscal year and, in each previous fiscal year, Congress had appropriated funds to EAC for requirements payments. The amounts appropriated by each continuing resolution, however, were subject to various provisions of those laws, including the so-called “entitlements provision,” the “high initial rate of operations” provision, and the “limited funding actions” provision, enacted in those laws. It is important to consider all the relevant provisions of the continuing resolutions and the operation of the particular program in determining how to obligate funds during continuing resolutions. *See, e.g.*, B-300167, Nov. 15, 2002, where we considered the implications of several different provisions of the continuing resolution and the operation of the Federal-Aid Highway Program.

The continuing resolution for fiscal year 2009 contained the following provision (the “entitlements provision”):

“For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2008, and for activities under the Food and Nutrition Act of 2008, activities shall be continued *at the rate to maintain program levels* under current law, under the authority and conditions provided in the applicable appropriations Act for fiscal year 2008, to be continued through the [expiration date of the continuing resolution].”

Pub. L. No. 110-329, § 111(a) (emphasis added). Congress enacted a similar provision in the 2005 continuing resolution. Pub. L. No. 108-309, § 126.

The entitlements provisions in the 2009 and 2005 continuing resolutions apply to (1) “entitlements and other mandatory payments” (2) “whose budget authority was provided in appropriations Acts” for the previous fiscal year. We concluded in 2008 that the EAC requirements payments are “mandatory payments.” B-316915, Sept. 25, 2008. They are “required to be paid” under 31 U.S.C. § 1501(a), which contains standards for the proper recording of obligations. *Id.* Therefore, in our view, requirements payments are “mandatory payments” under the entitlements provisions. Because budget authority for requirements payments was provided in appropriations acts in the fiscal years prior to fiscal years 2009 and 2005, the entitlements provisions

applied to the requirements payments appropriations while EAC operated under continuing resolutions in fiscal years 2009 and 2005.

Under the entitlements provisions, “activities shall be continued at the rate to maintain program levels under current law.” Knowledge of the particular program is essential. Under HAVA, the amount of a state’s requirements payment each year depends upon “the total amount appropriated for requirements payments *for the year* pursuant to the authorization under section 15407 of this title.” 42 U.S.C. § 15402(a)(1) (emphasis added). It is also important to note that HAVA generally provides that EAC make payments to states once a year. 42 U.S.C. § 15401(e). Therefore, to maintain program levels, it is not essential that EAC make payments while operating under a continuing resolution. Consistent with HAVA and as provided by current EAC procedures, states receive the year’s entire requirements payment in a single distribution. *See* EAC, Memorandum to Chief State Election Officials from Grants Director, *2010 Requirements Payment Disbursements*, Jan. 13, 2010. Consequently, EAC could wait to obligate funds until it had its regular appropriations for the year and still maintain program levels.

In addition, another provision of the continuing resolution must be considered: the so-called “high initial rate of operations” provision:

“Notwithstanding any other provision of this joint resolution . . . for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year 2009 because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and *no grants shall be awarded for such programs funded by this joint resolution that would impinge on final funding prerogatives.*”

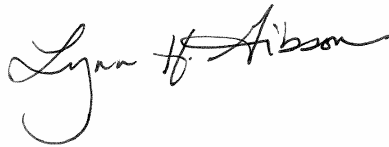
Pub. L. No. 110-329, § 109 (emphasis added). The fiscal year 2005 continuing resolution has a similar provision. Pub. L. No. 108-309, § 110. As we concluded in the 2008 EAC decision, requirements payments are obligated as a matter of law when Congress enacts a regular appropriation. B-316915, Sept. 25, 2008. Therefore, the requirements payments program would “otherwise have . . . complete distribution of appropriations at the beginning of fiscal year 2009 because of distributions of funding to . . . grantees.” EAC’s decision not to obligate amounts for requirements payments was consistent with this provision: the provision barred complete distribution of funding to grantees, and EAC distributed no funding to grantees while operating under the continuing resolutions.

Another applicable provision is the so-called “limited funding actions” provision:

“This joint resolution shall be implemented so that *only the most limited funding action* of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.”

Pub. L. No. 110-329, § 110 (emphasis added). The fiscal year 2005 continuing resolution has a similar provision. Pub. L. No. 108-309, § 111. EAC's actions also complied with this provision. EAC took the most limited funding action possible when it distributed no amounts for requirements payments while awaiting its regular appropriations. In addition, under current practice EAC distributes grants only once each fiscal year, a practice which is consistent with HAVA. Therefore, because states that receive HAVA funds ordinarily continue their projects and activities under a system of annual payments, EAC's actions are consistent with the most limited funding action provision's requirement that funding actions must "provide for the continuation of projects and activities."

The appropriations at issue here, that is, amounts made available in continuing resolutions, are subject to multiple conditions imposed by the continuing resolutions—here, most notably, the entitlements provision, the high initial rate of operations provision, and the limited funding action provision. Amounts made available in EAC's regular appropriations, which we addressed in our 2008 decision, were not subject to these conditions. Thus we do not object to EAC's actions while it operated under continuing resolutions at the beginning of fiscal years 2009 and 2005. Delaying obligations on a program that generally continues under a system of annual mandatory payments made late in the fiscal year is consistent with the relevant continuing resolution provisions.

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 a distinct "H" and "G".

Lynn H. Gibson
Acting General Counsel