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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214172 **DATE:** February 20, 1985

MATTER OF: Reconsideration of B-214172, July 10, 1984

DIGEST:

1. Spending levels established in authorizing legislation for three Small Business Administration (SBA) loan programs in 1984 fiscal year were not superseded or repealed by higher levels indicated in conference report on 1984 SBA appropriation which appropriated two lump-sums to fund these and other SBA programs. The authorizing legislation and the appropriation provision were entirely consistent with one another on their face. In these circumstances, an express statutory limitation cannot be superseded or repealed by contrary indications contained only in committee reports or other legislative history. 36 Comp. Gen. 240 (1956) and B-148736, September 15, 1977, distinguished. B-214172, July 10, 1984, affirmed.

2. Expenditures by Small Business Administration (SBA) in 1984 fiscal year that exceeded statutory ceilings in the authorizing legislation on the amount of direct loans that SBA could make in two of its direct loan programs would violate the Antideficiency Act since such expenditures would exceed available appropriations as that term is used in the Antideficiency Act. However, since a loan guarantee is only a contingent liability that does not require an actual obligation or expenditure of funds, SBA would not violate the Antideficiency Act if it exceeded the statutory ceiling on the amount of loans it could guarantee in a particular program in the 1984 fiscal year. B-214172, July 10, 1984, affirmed as modified.

This decision is in response to a letter dated September 5, 1984, from the Administrator of the Small Business Administration (SBA), asking our Office to reconsider our opinion B-214172, July 10, 1984, concerning the legal operating level for certain loan programs administered by SBA. Our opinion in that case was written in response to a request from the Chairman of the House Committee on Small Business for us to resolve what

SBA believed was a conflict beween the spending levels established for these programs in SBA's authorizing legislation and the levels provided for the same programs in SBA's appropriation for the 1984 fiscal year, as explained by the report of the conference committee on the 1984 appropriation act.

Our opinion of July 10, 1984, concluded that the lower spending levels established in the authorizing legislation for the three loan programs in the fiscal year "have not been superseded or repealed and remain in effect." Furthermore, we said that SBA should take whatever actions were necessary "to avoid overobligating or overspending the amounts legally available for each program." In the event the authorized spending level for any of the three programs involved had already been exceeded, we said that SBA "should make the reports and take the actions required by the Antideficiency Act, 31 U.S.C. § 1341." SBA is now asking us to reconsider our conclusions as to the legal spending levels for these three programs in the 1984 fiscal year and the possible violation of the Antideficiency Act if any of those levels were exceeded. Having done so, it is our view for the reasons set forth hereafter, that with one minor modification explained below, the position we reached in our opinion of July 10, 1984, was correct.

SBA's authorization for the 1984 fiscal year, set forth in subsection 20(q) of the Small Business Act as amended, 15 U.S.C. § 631 (note), established 1984 program levels of $15 million for direct loans to the handicapped, $35 million for direct purchases of debentures and preferred securities issued by Minority Enterprise Small Business Investment Companies (MESBICs), and $160 million for guaranteed loans issued by Small Business Investment Companies (SBICs). In addition, subsection 20(r) of the Act, 15 U.S.C. § 631 (note), authorized a total appropriation to SBA in the 1984 fiscal year of $804 million, of which $531 million was to be made available to carry out various programs, including the three programs involved here, and numerous others also authorized by subsections 20(q)(1)(2) and (3) of the Act. All of the loan programs authorized by subsection 20(q) (1-3) of the Act, including the three involved here, are funded out of the business loan and investment fund, established pursuant to section 4(c)(1)(B) of the Act, 15 U.S.C. § 633(c)(1)(B).

SBA's appropriation for the 1984 fiscal year appropriated two lump-sums for the programs funded out of the business loan and investment fund, as follows:

> "For additional capital for the 'Business loan and investment fund', authorized by the Small

> Business Act, as amended, $230,000,000, to remain available without fiscal year limitation; and for additional capital for new direct loan obligations to be incurred by the 'Business loan and investment fund,' authorized by the Small Business Act, as amended, $133,400,000, to remain available without fiscal year limitation." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1984, Pub. L. No. 98-166, 97 Stat. 1071, 1080, November 28, 1983.

The conference report on the appropriation act contains a table which breaks down the amounts appropriated for SBA's business loan and investment fund in the 1984 fiscal year on a program-by-program basis. H.R. (Conf.) Rep. No. 478, 98th Cong., 1st Sess. 19 (1983). The table lists the amount appropriated for handicapped direct loans, MESBIC debentures and guaranteed SBIC loans at $20 million, $41 million, and $250 million, respectively (as opposed to limits in the authorizing legislation for these programs of $15, $35, and $160 million, respectively).

Conflict Between Program Level in Authorizing and Appropriation Acts

It is SBA's position that the appropriation act provision, as explained by the information in the conference report, necessarily conflicts with the program levels established in the authorizing legislation. Therefore, since the appropriation act was the more recently enacted legislation, SBA maintains that Congress must have intended to supersede the program levels specified in the authorizing legislation for these three programs with the higher levels indicated in the conference report.

The primary basis for the conclusion we reached in our July 10 opinion that the spending levels specified in the authorizing legislation had not been superseded by the appropriation act was our determination that the two statutes did not, in fact, conflict with one another. Therefore, the so-called "later-in-time" rule, relied upon by SBA, did not apply, in our view. Our determination that the two statutes were not in conflict, and actually tended to complement each other, was based on three factors. First, the two specific lump-sum amounts in the 1984 SBA appropriation for the loan program funded out of the business loan and investment funds were well within the total authorized spending levels established by section 20(q) of the Small Business Act. Second, the total amount appropriated for these loan programs in fiscal year 1984 was only $363.4 million whereas subsection 20(r) of the Small Business Act authorized an appropriation of $531,000,000 for these programs. In this respect, we recognized that if the

lump-sum amounts had been greater than the total authorized appropriation for these programs "there might be good reason to consult the conference report or other legislative history materials for an explanation." Third, the appropriation act provision specifically referred to the authorizing legislation in a manner that indicated an intent to incorporate by reference the authorized program levels provided for in the Small Business Act.

We do not quarrel with the basic proposition, that "Congress may appropriate funds in excess of a cost limitation contained in the original authorization act and that the agency is thereby authorized to continue the program at the higher level." 55 Comp. Gen. 289, 292 (1975). However, it must be clear that Congress intended to amend or supersede the prior limitation. It is especially difficult to find clear evidence of such intent where, as here, the only indication that the statutory ceilings established in the authorizing legislation have been superseded is a table in the appropriation conference report which lists higher amounts for several programs than is set forth in the authorization.

As stated above, the appropriation act in this case merely appropriated two lump-sums for SBA loan programs funded out of the business loan and investment fund. Our Office has consistently held that "when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with these funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies." 55 Comp. Gen. 303, 319 (1975). Implicit within this holding is the more basic proposition, as stated in our July 10 opinion, that "an existing statutory limitation cannot be superseded or repealed by statements, explanations, recommendations, or tables contained only in committee reports or in other legislative history." In other words, if explanations or other comments in committee reports do not create any legally binding restrictions on an agency's discretionary authority to spend a lump-sum appropriation as it chooses, how can such comments supersede an existing statutory limitation that does impose a binding legal restriction on the agency's authority to dispose of a lump-sum appropriation.

SBA cites two of our prior decisions in support of its position in this case. While these decisions might at first glance appear to support SBA's position, we believe that both decisions were limited in scope and dealt with unusual factual situations that are distinguishable from the one involved here. In 36 Comp. Gen. 240 (1956) we considered a situation in which

Congress authorized $7 million in 1946 for the construction of two new four-lane bridges across the Potomac River to replace the existing bridge. After 10 years of construction, one of the bridges was completed at a final cost of approximately $6.8 million. The question presented to us was whether an additional $1,750,000 appropriation for the second bridge, included within a lump-sum amount contained in the District of Columbia Appropriation Act, 1957, was available to begin construction of the second bridge. We concluded that since there was "no question * * * that the * * * Appropriation Act, 1957, made an appropriation of $1,750,000 for construction of the replacement bridge * * *," the lack of specific legislation "increasing the ceiling on the cost of construction of the two bridges as fixed in the original authorization does not affect the validity or availability of the appropriation in question for the purpose for which provided."

The holding in 36 Comp. Gen. 240 was premised on our determination that there was no question that the District of Columbia Appropriation Act included $1,750,000 for the second bridge. This determination that Congress clearly intended to include these additional moneys for the second bridge in the lump-sum appropriation for "Capital Outlay, Department of Highways" and thereby supersede the $7,000,000 limit contained in the authorizing legislation was based on several factors that are not present in the instant case. At the time the appropriation involved was enacted, approximately 10 years after the authorizing legislation, the first bridge had been completed and the $7,000,000 authorized ceiling had essentially been reached. The legislative history of the appropriation act demonstrates Congress was well aware of this fact when the 1957 fiscal year appropriation for the District of Columbia was enacted. Moreover, the legislative history of the appropriation act clearly establishes that Congress intended to appropriate $1,750,000 to begin construction of the second bridge and knew that the $7,000,000 ceiling would be exceeded as a result.

The factors that allowed us to ascertain in 36 Comp. Gen. 240 that it was the intent of Congress to supersede the prior authorization limitation are not present here. The only evidence supporting SBA's position is a table in the conference report. There is absolutely nothing to indicate that Congress knew or intended that distribution of the SBA lump-sum appropriation along the lines indicated in the conference report table would exceed or was otherwise inconsistent with the statutory ceilings in the authorizing legislation. In fact, as stated above, based on the actual language of the SBA appropriation provision, Congress would have had every reason to believe that the statutes were entirely consistent with one another (as

we believe they were). As noted in our July 10, 1984 opinion, the appropriation provision specifically referred to the authorizing legislation in a manner indicating an intent to incorporate by reference the program ceilings "authorized by the Small Business Act, as amended." SBA argues that the quoted phrase "authorized by the Small Business Act, as amended" in the appropriation act simply refers to the business loan and investment fund authorized by section 4(c)(1) of the Small Business Act. While SBA's contention may be an arguable one, we believe the quoted phrase is essentially the same as the phrase "as authorized by * * *" which we have interpreted as requiring the funds involved to "be obligated only in accord with the applicable authorization act," 61 Comp. Gen. 532, 536 (1982). Accordingly, we do not believe that our holding in 36 Comp. Gen. 240 establishes a precedent that supports SBA's position in this case.

The second case cited by SBA is B-148736, September 15, 1977. In that case, we concluded that the National Park Service could expend a lump-sum appropriation provided for park planning and construction in the manner indicated in the legislative history of the appropriation act even though expenditures for several specific parks would exceed amounts authorized to be appropriated for those parks. In our view, this decision is distinguishable from the present case for many of the same reasons set forth in the preceding discussion of the applicability of 36 Comp. Gen. 240. Of particular importance is the absence of any language in the Park Service appropriation that is similar to the phrase "authorized by the Small Business Act, as amended" appearing in SBA's 1984 fiscal year appropriation, the significance of which is explained above. Moreover, based on the Park Service's statement that the ceilings on individual parks were being exceeded because of the "unprecedented increase" in the level of funding provided for park development and construction, we assumed that Congress was aware of the existing statutory limitations in the authorizing legislation when it approved the appropriation in question. Accordingly, it was reasonable for us to conclude that Congress had intended to supersede the ceilings in the authorizing legislation. As explained previously, there is no justification in the present case for us to make a similar assumption. Thus, the circumstances that were present in each of the precedent cases cited by SBA which led to our conclusion in those cases that the later action of the Congress in appropriating funds superseded the pre-existing authorization limits do not exist here.

Finally, SBA also contends that our opinion of July 10, 1984, mistakenly relied on the Supreme Court's decision in

Tennessee Valley Authority (TVA) v. Hill, 437 U.S. 153 (1978). That case involved a situation in which the appropriation committee report indicated that included within a lump-sum appropriation for the TVA was an amount for a particular project which was otherwise prohibited by a substantive statutory provision. In holding that the substantive provision had not been amended or repealed the Supreme Court said that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress * * *." SBA contends that the Supreme Court's holding in Hill is not applicable here primarily because in Hill the statutory provision that TVA maintained should have been amended or repealed by the appropriation report language was a substantive provision of law that was part of an unrelated statute.

We disagree with SBA's contention. Our reading of Hill convinces us that the factors SBA argues should distinguish that case from the present one were not the basis for the Supreme Court's holding. To the contrary, several factors relied upon by the Supreme Court in reaching its conclusion, such as the lack of jurisdiction of the Appropriations Committees over non-appropriations legislation, and the absence of any indication that "Congress as a whole, was aware" of the alleged conflict between the two statutes, are present in the instant case as well. Accordingly, we remain convinced that our position in this case is supported by Hill.

For the foregoing reasons, we reaffirm the conclusion reached in our opinion of July 10, 1984, that the applicable spending levels for these three loan programs in the 1984 fiscal year are these contained in section 20(q) of the Small Business Act.

Possible Violation of the Antideficiency Act

Our July 10, 1984 opinion also concluded that if SBA exceeded the authorized spending level for any of the three loan programs in the 1984 fiscal year, it should treat the over-expenditures as violations of the Antideficency Act, 31 U.S.C. § 1341. SBA maintains that even if our opinion was correct as to the applicable spending levels for these programs the expenditure of funds "in excess of the authorized levels does not violate the Antideficiency Act, 31 U.S.C. § 1341, when the expenditures are within the level of funds provided in the appropriation act." SBA argues that "Congress created the Antideficiency Act to prevent Government agencies from subjecting the Government to obligations of payments beyond available appropriations." Therefore, SBA concludes that obligations that do not exceed the amount appropriated do not violate the

Act. We disagree with SBA's position. However, having reconsidered the matter, it is now our view, as explained hereafter, that some modification of what we said in our opinion is required.

The applicable provision in the Antideficiency Act is contained in 31 U.S.C. § 1341(a)(1), which reads as follows:

> "(a)(1) An officer or employee of the United States Government * * * may not--
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> "(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation * * *."

It is our view that expenditures by SBA in fiscal year 1984 that were greater than the authorized spending levels for the programs, as set forth in section 20(q) of the Small Business Act, would have exceeded "available" appropriations as that term is used in the Antideficiency Act. It would make little sense for us to conclude that the information in the appropriation act's legislative history, while insufficient to justify a determination that the authorized spending levels for these programs had been increased, would support the conclusion that expenditures by SBA that exceeded those levels did not violate the Antideficiency Act's prohibition against exceeding available appropriations.

Several recent decisions support the conclusion that the Antideficiency Act is applicable in this situation. In 60 Comp. Gen. 440, (1981) we considered whether the Customs Service's violation of a provision in its 1980 fiscal year appropriation prohibiting it from paying more than $80,000 in overtime pay to any employee violated the Antideficiency Act. The Customs Service maintained that the Antideficiency Act did not deal "with the circumstance of the obligation of available funds contrary to a statutory limitation." We held that the "Antideficiency Act prohibits not only expenditures which exceed the amount appropriated, but also expenditures which violate statutory restrictions or limitations on obligations or spending." See, also B-204230, October 13, 1981. While both of these cases involved limitations that were contained in an appropriation act, we believe that the rationale behind those decisions would apply equally to a limitation contained in authorizing legislation. The broadly worded holding of 60 Comp. Gen. 440, quoted above, supports this view.

If SBA exceeded authorized spending levels for those programs, we do not doubt that it did so in good faith believing that the spending levels established for these programs in the

authorizing legislation had been superseded. Nevertheless, for purposes of determining if the Antideficiency Act has been violated, it is immaterial whether or not the agency is at fault. See 58 Comp. Gen. 46 (1978). The statute flatly prohibits an agency from making expenditures or entering into obligations exceeding the amount available for that purpose regardless of the reason.

Notwithstanding the foregoing, it is our view that some modification of our position is indicated. In concluding that SBA would have to follow the procedures set forth in the Antideficiency Act if it exceeded the authorized amounts for these programs, we did not make any distinction between the three programs involved. Upon reviewing our position in this respect, we believe it is necessary to distinguish between the two direct loan programs on the one hand and the guaranteed loan program on the other. We continue to believe that if SBA exceeded the $15 million limit on direct loans to the handicapped or the $35 million limit on direct purchase of MESBIC debentures in the 1984 fiscal year, SBA is required to treat the overexpenditures as violations of the Antideficiency Act. However, if SBA exceeded the $160 million limit on guaranteed SBA loans, the situation would be different, in our view.

When an agency makes a direct loan, it enters into a valid obligation requiring the agency to disburse funds to the borrower in accordance with the terms of the loan. A loan guarantee, however, only constitutes a contingent liability that does not require the agency to make any initial disbursement of appropriated funds to the borrower. Ordinarily, when a loan is guaranteed by the Federal Government, the Government does not obligate or expend any funds unless and until the borrower defaults. See 60 Comp. Gen. 700, 703 (1981). Therefore, even if SBA guaranteed more than $160 million in SBIC loans in the 1984 fiscal year, thereby exceeding the authorized level for that program, SBA would not be making or authorizing "an expenditure or obligation" in excess of available appropriations, as that term is used in the Antideficiency Act. This does not mean that SBA, or any other agency with loan guarantee authority, is free to ignore Congressionally imposed limitations or ceilings on the allowable level of loan guarantee activity in a particular fiscal year. If such limitations are set forth in an authorization, appropriation, or other statutory enactment, they are legally binding on the agency involved and should be

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followed. See 60 Comp. Gen. 700 (1981). However, an agency's failure to adhere to a statutory ceiling in the level of loan guarantee activity, while unauthorized, is not a violation of the Antideficiency Act. Our opinion of July 10, 1984, is modified accordingly.

Milton J. Socolar

for Comptroller General
of the United States