

B-164912-O.M.

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Director, PSAD

Paul G. Dembling

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PSAD questions concerning National Aeronautics and Space Administration funding practices - B-164912-O.M.

Messrs. Joe Johnson and Paul Francis of your staff have asked for our views on two National Aeronautics and Space Administration (NASA) funding procedures as set out below.

The initial question relates to the extent NASA may be permitted to use interchangeably the three separate appropriations it receives. NASA authorizations and appropriations fall under the broad headings of Research and Development, Construction of Facilities, and Research and Program Management. See, Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1977, Pub. L. No. 94-378, 90 Stat. 1101-1102, and the National Aeronautics and Space Administration Authorization Act of 1977, Pub. L. No. 94-307, 91 Stat. 1073-1080.*/

It was said that in at least one instance NASA has funded a single project with two different appropriations. For example, fire protection services at most NASA facilities are funded from the Research and Program Management (R&PM) appropriation. However, fire protection services at one NASA installation are funded from the Research and Development (R&D) appropriation. Inasmuch as NASA's explanation for this practice has not yet been solicited (per agreement with your staff), and there is no indication of whether similar practices have been followed with respect to other line items, we are unable to provide criteria by which it may be conclusively determined whether any given project may be simultaneously funded from two separate appropriations. Nevertheless, a review of the authorizing and appropriation legislation should provide a general legal framework for assessing NASA funding practices.

The annual NASA authorization acts are structured in such a way as to generally limit the use of appropriations made thereunder to the line-item

*/ The provisions of the 1978 NASA authorization and appropriation acts are generally similar to the 1977 provisions discussed herein. See Pub. L. No. 95-76 (July 30, 1977), 91 Stat. 312; Pub. L. No. 95-119 (October 4, 1977), 91 Stat. 1073, 1080-81.

program or activity amounts specified in the applicable authorization acts. However, the authorization acts do provide some flexibility to transfer funds from one appropriation to another and to "reprogram" funds within an appropriation.

The term "reprogramming" customarily refers to the application of appropriations within a particular account to purposes, or in amounts, other than those justified in the budget submissions or otherwise considered or indicated by congressional committees in connection with the enactment of appropriation legislation. The appropriations committees of the Congress, and in some cases authorizing committees as well, have over the years imposed requirements for notice and/or approval of reprogrammings. While these requirements need not necessarily derive from statute, section 4 of Pub. L. No. 94-307, 90 Stat. 880, specifically provides:

"Notwithstanding any other provision of this Act--

(1) no amount appropriated pursuant to this Act may be used for any program deleted by the Congress from requests as originally made to either the House Committee on Science and Technology or the Senate Committee on Aeronautical and Space Sciences,*/

(2) no amounts appropriated pursuant to this Act may be used for any program in excess of the amount actually authorized for that particular program by sections 1(a) and 1(c), and

(3) no amount appropriated pursuant to this Act may be used for any program which has not been presented to or requested of either such committee.

unless (A) a period of thirty days has passed after the receipt by the Speaker of the House of Representatives and the President of the Senate and each such committee of notice given by the Administrator or his designee containing a full and complete statement of the action proposed to be taken and the facts and circumstances relied upon in support of such proposed action, or (B) each such committee before the expiration of

*/ Section 4 of Pub. L. No. 95-76 (July 30, 1970), supra, the 1978 NASA authorization act is identical except that the name of the applicable Senate Committee has been changed to the "Senate Committee on Commerce, Science, and Transportation."

such period has transmitted to the Administrator written notice to the effect that such committee has no objection to the proposed action. "

These statutory reprogramming procedures are of course, legally binding and NASA appropriations are not available for expenditure in a manner inconsistent with section 4. The only express transfer and reprogramming authorities contained in the Act apply specifically to the use of R&D or R&PM funds for construction purposes; variation in "Construction of Facilities" amounts; and transfer of R&D or R&PM funds to the "Construction of Facilities" appropriation. See Pub. L. No. 94-307, sections 1(g), 2, and 3, 90 Stat. 679.

The appropriations for "Construction of Facilities" provide the funds required for the construction of buildings, laboratories, launch and test facilities, or alterations or additions to these facilities, necessary to carry out the experimentation, research, and development for NASA's programs. See Pub. L. No. 94-378, 90 Stat. 1102. In fiscal year 1961 and previous years this category was called "Construction and Equipment." This has now been changed to "Construction of Facilities." The change reflects the decision by NASA to fund from the R&D appropriation those items of equipment which are unconnected with construction, even though they may exceed \$250,000 in cost. Items of equipment associated with construction, regardless of the cost, continued to be funded from the "Construction of Facilities" appropriation. S. Rep. No. 475, 87th Cong., 1st Sess. 66 (1961), on the 1962 NASA authorization act, Pub. L. No. 87-98 (July 21, 1961), 75 Stat. 216.

We are aware of no provision in either the authorization or the appropriation act which could be construed to permit NASA to transfer "Construction" funds to another appropriation or to expend them for a purpose falling within the purview of either the R&D or the R&PM appropriation. Section 2 of Pub. L. No. 94-307 does, however, provide limited reprogramming authority whereby the NASA Administrator may at his discretion, increase by as much as 10 percent any "Construction of Facilities" line-item project amounts authorized under subsections 1(b)(1)-1(b)(17) of Pub. L. No. 94-307 so long as the total cost of all specified construction projects does not exceed the total of the amounts authorized for "Construction of Facilities." Section 2 also provides that amounts authorized for the construction of facilities specified in subsections 1(b)(1)-1(b)(17) may be increased by up to 25 percent if the Administrator or his designee first reports the circumstances of the increase to the requisite House and Senate committee.

This limited authority to reprogram expenditures within the "Construction of Facilities" appropriation may not be construed as authority to transfer "Construction" funds to one of the other two NASA appropriations.

Section 1(d) of Pub. L. No. 94-307, 90 Stat. 678, authorizes the use of the R&D appropriation for (1) items of a capital nature, except land acquisition, which may be required for the performance for research and development contracts, and (2) purchase or construction of additional research facilities under grants to non-profit institutions of higher education and non-profit organizations whose primary purpose is the conduct of scientific research. When the estimated cost of any major facility, including collateral equipment, exceeds \$250,000, section 1(d) requires that the NASA Administrator notify the Committee on Science and Technology of the House of Representatives and the Committee on Aeronautical and Space Sciences of the Senate (the new Committee on Commerce, Science, and Transportation) of the nature, location, and estimated cost of such facility.

In commenting on the nearly identical "reprogramming" provision contained in the National Aeronautics and Space Administration Authorization Act for fiscal year 1963, Pub. L. No. 87-584, section 1(c), 76 Stat. 382, we said in B-151157, June 10, 1963, that the only statutory restriction on the provision's reprogramming authority is that the facilities constructed with R&D funds "must be required for the performance of research and development contracts." However, it must be noted that this authority to use R&D funds for what might generally be considered to include construction purposes does not constitute a transfer of funds from R&D to "Construction of Facilities." It merely makes R&D funds available for certain R&D related construction purposes.

Section 1(g) of Pub. L. No. 94-307, 90 Stat. 679, provides that minor new construction up to \$25,000 per project and facility rehabilitations and modifications up to \$50,000 per project may be performed under the R&D and the R&PM appropriations. Also, either type of project up to an estimated cost of \$250,000 could be accomplished from R&D funds to satisfy "unforeseen programmatic needs." Although expenditures made pursuant to section 1(g) may be for work which is very similar to the work authorized under the "Construction" appropriation, section 1(g) is not authority for NASA to transfer R&D and R&PM funds to the "Construction" appropriation. As in the case of section 1(d), discussed above, this authority merely makes R&D and R&PM funds available for certain construction purposes which would otherwise have to be funded by the "Construction of Facilities" appropriation. This does not mean that NASA can make expenditures for facilities using R&D or R&PM funds which properly should have been provided under the "Construction of Facilities" appropriation by giving the term "unforeseen programmatic need" an unreasonable construction. An unjustified expenditure for construction from these funds would amount to an unauthorized transfer.

Section 3 of Pub. L. No. 94-307 expressly authorizes the transfer of one-half of 1 percent of R&D appropriations to the "Construction of Facilities" appropriation, to be available after transfer for reprogramming in

accordance with the reprogramming requirements of that section. Other than section 3, we find no authority for reprogramming or transfer of funds from either the R&D or the R&PM appropriation.

The R&PM authorization (section 1(c) of Pub. L. No. 94-307) provides for (1) the civil service employees needed to perform in-house research, technology, and test activities; and to plan, manage, and support the R&D programs; and (2) the other elements of operational capability of the laboratories and facilities such as utilities; logistics support, maintenance, and operation of facilities; and technical and administrative support. H. R. Rep. No. 94-897, 162-166 (1976), lists and defines five functional categories composing the 1977 R&PM budget estimate. Under the functional category for "Maintenance and Related Services," custodial services are defined to include "janitorial, laundry, guard and security, fire protection, and refuse handling services." *Id.* at 165. (Emphasis added.) Accordingly, it appears that fire protection services for all NASA installations must be funded from the R&PM appropriation. We know of no authority which would justify the interchangeable expenditure of R&D and R&PM funds for this purpose. However, we cannot definitively speak to this issue without NASA's views.

The second question is whether NASA may, in lieu of deposit to miscellaneous receipts, retain payments from foreign countries for use of its "Landsat" data. During the Senate appropriations hearings for fiscal year 1978, NASA responded to this question by stating that it retained the payments to offset Landsat costs "under reimbursable authority contained in the National Aeronautics and Space Act." NASA officials have informally advised us that the specific authority to which they referred is contained in section 203(c)(5) of the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C.A. § 2473(c)(5).

Subsection 203(c)(5) provides in part that NASA is authorized--

"* * * to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate with any agency or instrumentality of the United States or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm association, corporation, or educational institution. * * *"

In addition, subsection 203(c)(6) authorizes NASA--

"to use, with their consent, the services, equipment, personnel, and facilities of Federal and other agencies with or

without reimbursement, and on a similar basis to cooperate with other public and private agencies and instrumentalities in the use of services, equipment, and facilities. Each department and agency of the Federal Government shall cooperate fully with the Administration in making its services, equipment, personnel, and facilities available to the Administration, and any such department or agency is authorized, notwithstanding any other provision of law, to transfer to or to receive from the Administration, without reimbursement, aeronautical and space vehicles, and supplies and equipment other than administrative supplies or equipment * * *."

In B-168707-O.M., August 13, 1973, we concluded that these provisions constitute "ample authority" to enter into cooperative agreements with foreign entities to perform launching and related services. In B-168707-O.M., May 11, 1970, we held that reimbursements received pursuant to cooperative agreements entered into under this provision could be credited to the appropriation involved. Accordingly, it is our view that the reimbursements received from Landsat properly may be credited to the appropriations from which the funds were expended.