

*Memorandum**B-168482-o.m., Aug. 15, 1974*

JUN 26 1974

TO : General Counsel

*F. J. Shafer*

FROM : Director, LogCom - F. J. Shafer

SUBJECT: Request for a Decision Whether the  
Navy was in Violation of the Anti-  
deficiency Act (31 U.S.C. 665)  
(Code 945048)

On January 2, 1974, the Congress approved the Department of Defense Appropriation Act (87 STAT. 1026) providing the Department of the Navy over \$2 billion in appropriations for Research, Development, Test, and Evaluation (RDT&E) for fiscal year 1974. The Committee of Conference in its report (No. 93-741, dated December 19, 1973) specified that \$8.3 million of the appropriations was for the Navy to continue Project Sanguine, a communications program.

We have been requested by two congressmen (see attachment I) to investigate the Navy's expenditure of funds in fiscal year 1974 for Project Sanguine. Contacts with the Navy had indicated to these congressmen that the Navy had obligated more on the Project during fiscal year 1974 than was appropriated. We were also asked to give an opinion whether the Navy had illegally spent funds for the Project and, if so, what action the Navy should take to be in compliance with the Appropriation Act.

The following information is submitted for your consideration in assisting us to respond to the congressmen's requests for an opinion as to the legality of the Navy's expenditures. Should you have questions or desire additional information, please call either Mr. James G. Mitchell, Assistant Director, or Mr. Walter Sienkiewich, Audit Manager. Both can be reached on IDS Code 183-7661.

### Statement of Facts

We found the Navy has obligated and disbursed funds for Project Sanguine in excess of the \$8.3 million specified in the Committee of Conference report as approved for fiscal year 1974. As of May 31, 1974, \$11.752 million has been expended on the Project during fiscal year 1974.

Navy records indicate that as of July 1, 1973, the Navy programmed \$16.6 million for Project Sanguine, deferred \$1.3 million pending milestone completions during first half of fiscal year 1974, and approved for obligation \$15.375 million.

The contracts awarded for Project Sanguine work were largely multi-year or encompassed a period covering two or more fiscal years. We noted the Navy entered into three concept validation contracts on April 27, 1973, totalling \$8,999,700, with \$8,441,000 of this amount scheduled to be paid out of fiscal year 1974 appropriated funds. The contracts were to be completed on March 23, 1974. Also, we noted about \$1.8 million in fiscal year 1974 funds were required to cover contract work initiated in prior years and carried over into fiscal year 1974.

Our review of the congressional hearings indicated that the first objection to the Sanguine Project was made during the House Appropriation hearings on September 24, 1973. A staff assistant to the Subcommittee of the House Committee on Appropriations expressed the view that there were other communication systems with submarines that can be used as an alternative and if Project Sanguine is a controversial system, it need not be pursued. He said, it would be a redundancy and not a primary system.

At the time the House Appropriations Committee recommended the deletion of Project Sanguine (November 26, 1973), the Office of Naval Research records showed that as of September 30, 1973, the Navy had obligated \$12,976,000 for Project Sanguine.

We noted that subsequent to the House Appropriation Committee's recommendation to delete the project and prior to the enactment of the appropriation act, the Navy initiated action to reduce the amount of the project. On December 21, 1973, the Sanguine Project Manager began contacting all contractors and individuals involved in the expenditure of funds and requested the estimated expenditures as of December 31, 1973, and termination costs, if any, should the project be cancelled at that time. On January 17, 1974, the Project Manager summarized the replies

received which indicated that cost incurred would have amounted to \$9,059,000 and termination costs would have amounted to \$1,522,000 for a total of \$10,581,000. We also noted that practically all termination costs would have resulted from the termination of the concept validation contracts.

The Navy started de obligating funds in January 1974; by March 8th it had reduced its obligations by \$1,875,000 which resulted in a total obligation of \$12,707,000. The Navy, at this time, was of the view there was need for \$12.8 million to carry out the project obligations.

We were informed that based on the results of the responses made to the Project Manager's December 21, 1973 request, the Navy on April 15, 1974, reduced the amount of funds for the project to \$11.752 million.

Navy officials informed us that the additional funds needed for Project Sanguine were obtained from other programs within the Navy. The exact source of the funds, however, would require a detailed analysis of all the Navy reprogramming actions during the fiscal year.

We found that on January 11, 1974, reprogramming actions for certain projects were approved. Among them, the Navigation Satellite program was reduced by \$3.4 million and the Submarine Tactical Warfare System (Advanced) program was reduced by \$1.4 million. On January 17, 1974, the Assistant Secretary of the Navy (Research and Development) requested the Comptroller of the Navy to approve the reprogramming of \$4.5 million for Project Sanguine, citing the above programs as the sources for the funds. The Deputy Secretary of Defense, in his request of the Chairman, House Committee on Appropriations to approve the reprogramming of \$4.5 million, also cited these two programs as sources of funds. We were told by the Budget Officer, Office of Naval Research that the request for the \$4.5 million reprogramming was not approved by the Comptroller of the Navy, however, the initial funds for Sanguine did come from these sources. The Budget Officer stated subsequent reprogramming actions by the Navy, however, restored the Navigation Satellite program funds by reducing other Naval project funds.

A detailed chronology of events relative to fiscal year 1974 appropriations and expenditures for Project Sanguine is contained in attachment II.

Views of the Departments  
of Defense and the Navy

Although the Navy had obligated and disbursed funds for Project Sanguine in excess of the \$8.3 million specified in the report of the Committee of Conference, it does not consider itself to be in violation of the antideficiency statute. This posture is taken largely because prior to the approval of appropriated funds, and in the absence of any specific information from the Congress that reduction in this on-going program was contemplated, the Navy found it necessary, under the incremental funding principles, to obligate funds in excess of the \$8.3 million to fulfill its contractual obligations.

The Assistant Secretary of Defense, in a "Memorandum for the Record", dated April 17, 1974, indicated the reasons why the Department of Defense considers that there has been no violation of the anti-deficiency statute. In this connection, he stated the following:

"One of the objectives of the incremental funding principle which governs RDT&E budget requests is the timely obligation of funds on second and succeeding years of multi-year contracts. SANGUINE is largely comprised of such contracts. In the absence of any specific information that Congressional reductions in this on-going program were contemplated, OSD had released and the Navy had obligated by September, 1973, under Continuing Resolution Authority, about \$13.0 million of \$16.6 million requested for SANGUINE in FY 1974. Both Armed Services Committees had by then approved the FY 1974 requested funds for SANGUINE.

"The House Appropriations Committee Report, dated November 26, 1973, recommended deletion of the entire \$16.6 million requested and directed that SANGUINE be terminated. DOD appealed to the Senate Appropriation Committee pointing out that, among other things, at least \$13.0 million in liabilities had already been created. The Senate Appropriations Committee approved the full amount requested for SANGUINE. DOD thereupon appealed to the Committee of Conference again noting that at least \$13 million in liabilities had already been created. The Conferees finally approved on December 19, 1973 \$8.3 million for continuation of the program (without explanation of how this amount was arrived at) with the provisos that the funds were available for work only at the Wisconsin Test Site, and that none of the funds were to be applied to full scale development. There was no further amplification as to what kind of program was desired.

"At that point program termination was considered. However, funds already expended plus estimated termination costs would have amounted to nearly \$11 million and valuable contractual efforts, which had been underway, would not be completed. Also, the conference report did indicate support for continuation of the program. The alternative selected was to scale the SANGUINE program down to a continuing but austere level and seek authority to reprogram funds to SANGUINE within the RDT&E, Navy appropriation. The latter course was chosen as being the most advantageous to the Government and presumably in accordance with Congressional desires. A "continuing" program at an \$8.3 million level was not feasible. Accordingly, the Navy reduced the FY 1974 SANGUINE program to \$12.8 million and a prior approval reprogramming request was sent to the Congressional Armed Services and Appropriations Committees.

"By letter dated March 28, 1974, the Chairman of the House Appropriations Committee informed the DOD that the reprogramming request could not be considered.

"In two separate administrative actions the SANGUINE program has since been reduced to a level of \$11,752,000. This action suspends any further experimentation or development activity. It provides only for expenditures already incurred, for expenses associated with caretaker personnel at the Wisconsin Test Facility to safeguard Government property and for termination costs incurred in contract cancellations.

"A review of this matter indicates no violation of RS 3679, the "anti-deficiency" statute. There has been no obligation of funds in excess of Congressionally approved totals for the "RDT&E, Navy" appropriation. Further, administrative subdivisions below the appropriation level have not been exceeded. The action of the House Appropriations Committee in not processing the reprogramming request (DD 1415) has created the necessity for the following procedures regarding the reporting of program status. The report DD Form 1416, Report of Programs, for the period ending June 30, 1974, will record the actual FY 1974 of \$11,752,000 for the SANGUINE program. FY 1974 SANGUINE efforts will be limited to this total and will be financed within resources currently available in the RDT&E, N appropriation."

On April 1, 1974, the Navy presented a justification for its exceeding the \$8.3 million before the Research and Development Subcommittee of the Senate Committee on Armed Services. At that time, the Navy made the following statements:

"The original FY 1974 Sanguine Fund request was for \$16.7M. Of this amount 60% or approximately \$10M was for the continuation of existing contracts awarded in FY 1973 or previous years. This was in accord with the Congressional incremental funding policy. By the time the \$8.3M was appropriated in December 1973, it was estimated that expenditures exceeded \$9M and there would be additional termination charges in the amount of \$1.5M. These termination charges would largely result from the termination of the three Concept Validation contracts that had three months to be completed. If the contracts were terminated, the Government would not receive the final results of the design effort undertaken in the previous eight months of contract effort. Therefore, it was considered more beneficial to the Government to complete the C.V. effort than to terminate it. It was determined that the completion of this effort and its subsequent evaluation in the 4th Quarter of FY 1974 would require an additional \$4.5M in FY 74 funds for a total of \$12.8M. Immediate steps were taken in December 1973 to deobligate \$3.9M in funds and reduce the overall contractual support for the 4th Quarter of FY 1974 and delay the design and procurement of test and evaluation instrumentation. Concurrently, with the above action funds in the amount of \$4.5M were identified within existing Navy resources and a request for reprogramming was forwarded in February 1974."

B-168482-O.M.

Indorsement

August 15, 1974

Director, LCD

Returned. The Antideficiency Act, 31 U.S.C. § 665, prohibits expenditures or obligations in excess of appropriations or in advance of appropriations unless "authorized by law." The act further requires appropriations to be apportioned over their period of availability so as to preclude the necessity for deficiency or supplemental appropriations, and prohibits expenditures or obligations in excess of such apportionment. Violations are to be reported to the President and to the Congress.

As indicated in your submission, the Navy originally requested \$16,675,000 for Project Sanguine for fiscal year 1974. Due largely to controversy arising out of environmental concerns, the House Committee on Appropriations recommended deletion of the entire amount. Following appeals by the Department of Defense (DOD), the Senate Committee on Appropriations restored the full \$16.7 million. In an apparent

compromise, the Conference Committee provided \$8.3 million for Sanguine, under the condition that the funds "are to be available for continuation of effort at the Wisconsin test facility, and none of the funds are to be applied to any full scale development efforts."

H.R. Rep. No. 741, 93d Cong., 1st Sess. 24 (1973). The DOD Appropriation Act for 1974, Public Law 93-238, 87 Stat. 1026, 1036, when finally enacted on January 2, 1974, provided as follows under the heading "Research, Development, Test, and Evaluation /RDT&E/, Navy"--

"For expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, as authorized by law; \$2,651,805,000, to remain available for obligation until June 30, 1975: Provided further, That no part of the appropriation contained in this Act shall be used for Full Scale Development of Project Sanguine."

The first question to be considered is the legal effect of the amount provided in the Conference Report in light of the specific language of the appropriation act. While we have never ruled on this precise question, we have held that budget estimates on particular line items are not binding. Thus, in 17 Comp. Gen. 147, 150 (1937), we said:

"The amounts of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself."

See also B-149163, June 27, 1962. This is true even though the passage of a lump-sum appropriation, where there has been no congressional disagreement with the budget estimate on a particular line item, could be viewed as congressional approval of the estimate and an indication of congressional desire that no more than the amount of the estimate be spent on that particular item. Although the situation here is somewhat different in that the recommendation of the Conference Committee constitutes an affirmative measure rather than mere acquiescence, we do not believe that this distinction can operate so as to insert in a statute a limitation not imposed by its terms. Thus, it is our view that the action of the Conference Committee is not legally binding unless carried into the appropriation act itself. The only limitation in Public Law 93-238 with respect to Project Sanguine was the proviso that no part of the appropriation be used for full scale development.

Fiscal year 1974 expenditures and obligations prior to the enactment of Public Law 93-238 took place under the authority of a joint (continuing) resolution, Public Law 93-52, 87 Stat. 130, July 1, 1973.

The resolution expired on September 30, 1973, but was extended by Public Law 93-118 to October 11, 1973, and by Public Law 93-124 to the sine die adjournment of the first session of the 93d Congress. Section 101(b) of Public Law 93-52 provided for the appropriation of--

"Such amounts as may be necessary for continuing projects or activities (not otherwise provided for in this joint resolution) which were conducted in the fiscal year 1973 and are listed in this subsection at a rate for operations not in excess of the current rate or the rate provided for in the budget estimate, whichever is lower, and under the more restrictive authority--

\* \* \* \* \*

"activities for which provision was made in the Department of Defense Appropriation Act, 1973; \* \* \*"

In B-152554, December 6, 1963, a case involving a similar resolution, we discussed the meaning of the phrase "rate for operations not in excess of the current rate" as follows:

"'Rate' has been defined as a price or amount stated or fixed on anything with relation to a standard, a fixed ratio, a settled proportion. City of Chicago v. Illinois Commerce Commission, 150 N.E. 2d 776. The language 'current rate' as used in subsection 101(b) might at first glance be viewed to mean the rate of operations for the corresponding month of fiscal year 1963, or as 1/12 of the appropriations for 1963, or the month of June 1963, or some other portion of the appropriations for 1963. The only standard, fixed ratio, or settled proportion provided for therein with which the 'current rate' is to be related is 'the rate provided for in the budget estimate.' Since the budget estimate is for a full fiscal year it follows that the 'current rate' may have been intended to mean the rate of operations which was carried on within the appropriations for the entire fiscal year 1963. There is some legislative history of the instant joint resolution to support this view. Therefore while obligations incurred by an agency during any particular month may exceed the June 1963 obligations, 1/12 of obligations incurred for fiscal year 1963, or obligations incurred during some other portion of fiscal year 1963, it does not necessarily follow that there has been a violation of subsection 101(b). Variations in the monthly



or quarterly obligations are recognized in the apportionment procedures authorized by the antideficiency act, section 3679, Revised Statutes, as amended, 31 U.S.C. 665. Any mathematical formula not recognizing such variations in the many complex governmental programs would not seem practicable. While the legislative intent of the term 'current rate' is not clear, we are inclined to the view that the requirements of subsection 101(b) have been met where an agency can establish that it is operating under a flexible plan that would enable continuation of activities throughout the fiscal year 1964 within the level of the appropriations available during the preceding fiscal year or as provided in the budget estimate, whichever is lower. The guide for agencies restricted to the current rate generally should be the pattern of obligations incurred during the fiscal year 1963. Once the appropriation act has been enacted, expenditures must be charged to the applicable appropriation, as required by section 103 of Pub. L. 88-55."

The "rate for operations" limitation discussed above, however, applies only to "projects or activities \* \* \* which were conducted in the fiscal year 1973 and are listed in" section 101(b). Thus the limit of Navy's obligation authority under Public Law 93-52 depends upon whether Sanguine is a "project or activity" for purposes of section 101(b). The language of section 101(b) has remained essentially unchanged in similar resolutions year after year. The term "projects or activities" is not defined in this or prior resolutions, and we are not aware of anything in the legislative histories of such resolutions indicating any congressional intent as to its meaning. At first glance, it might seem logical to construe the term "projects or activities" as used in the continuing resolution to mean the "programs by activities" as set out in the budget. But this would require a tremendous amount of book-keeping and would be contrary to the very purpose of subsection (g) of section 3679, Revised Statutes, 31 U.S.C. 665(g) as added by Public Law 863, approved August 1, 1956, 70 Stat. 782.

In any event, we see no basis whatever for construing the term "projects or activities" as applying to line items under the "activities" set out in the budget. Since Project Sanguine is a line item under the budget activity "Missiles and related equipment" for which \$915,920,000 was requested for 1974, and for which \$760,372,000 had been provided for 1973, we cannot conclude that the obligation of approximately \$14,000,000 for this project under the continuing resolution constituted a violation thereof.

The next area to be considered is the Navy's attempt to obtain additional funds for Sanguine by reprogramming. Reprogramming is a nonstatutory arrangement based on agreement between the individual agency and the congressional committees. DOD reprogramming policies and procedures are contained in DOD Directive 7250.5 and DOD Instruction 7250.10. By letter of February 28, 1974, DOD requested approval from the House Committee on Appropriations for the reprogramming of \$4.5 million within the RDT&E appropriation to enable completion of concept validation contracts initiated in fiscal year 1973. The Committee refused to consider the request by letter dated March 28, 1974, basing its refusal on section 745 of Public Law 93-238, which provides that--

"No part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for the reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress."

This language was contained in the bill that was reported by the House Committee on Appropriations and read literally would appear to prohibit requests for reprogramming--assuming the item met the higher priority criterion--only in those instances where the "item"--as distinguished from "funds"--for which reprogramming was requested had been denied by the Congress. However, the legislative history of section 745 indicates that it was intended by the enactment of section 745 to preclude reprogramming requests by DOD for restoration of funds which had been specifically deleted in the legislative process. The House Appropriations Committee felt that to concur, through the reprogramming process, in the restoration of funds which have been specifically deleted in the legislative process would place congressional committees in the position of undoing the work of the Congress. See page 16, House Report No. 93-662 on the bill which became Public Law 93-238.

As indicated above, DOD requested \$16,675,000 for Project Sanguine for fiscal year 1974, the House Appropriations Committee deleted the entire amount, the Senate Appropriations Committee restored the entire amount (approximately \$16.6 million), and the Conference Committee provided \$8.3 million for the project, subject to certain conditions. Thus, approximately \$8.3 million of the funds (\$16.6 million) requested by DOD for Project Sanguine were specifically deleted in the legislative process.

The Chairman of the House Appropriations Committee, in the above-cited letter denying DOD's reprogramming request for additional funds

for Project Sanguine, set forth therein as a reason the fact that the funds requested would restore an amount specifically deleted by the Congress in action on DOD's fiscal year 1974 appropriation and thus that the presentation of the request was prohibited by section 745 as an item for which funds had been denied by the Congress. Moreover, we also have serious doubts that the appropriation is available--for costs of the reprogramming request--for the reason that, on the facts before us, we cannot perceive of Project Sanguine being properly characterized as a high priority item, "based on unforeseen military requirements." In this regard the reprogramming request appears to have been for monies to fund existing contractual obligations.

We note from your memorandum that the Navy may have taken the reprogramming action first, and then submitted the request for approval. While we express no view as to whether the prior approval of the House and Senate Committees on Appropriations was required--by committee instructions--in the present situation and under the DOD directives cited above, the Navy apparently believed that such prior approval was required. See Hearings on S. 3000 Before the Senate Committee on Armed Services, 93d Cong., 2d Sess., pt. 6, at 3173 (1974). While Navy may thus have violated the DOD directives and may have failed to fulfill its agreement with the pertinent congressional committees, we are unable to conclude that its reprogramming action was unlawful. The House Committee on Appropriations recognized this in its comments on section 745:

"In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills." H.R. Rep. No. 93-662, p. 16 (1974).

For the reasons discussed herein, while the Navy may have failed to follow the directive of the Conference Committee report, we are unable to conclude that it violated the terms of the Continuing Resolution so as to give rise to an Antideficiency Act violation. On the other hand, since the expenditure of funds to prepare and present the reprogramming request was in violation of section 745, there would be a technical violation of the Antideficiency Act. However, the only action that could be taken would be to attempt recovery of the amount improperly expended. Thus, recovery would be limited to the cost of developing, typing, and presenting the reprogramming request, assuming such costs were determinable.

**MILTON SOCOLAR**

For the Paul G. Dembling  
General Counsel

AUG 15 1974

DIGEST

Where appropriation act contained lump-sum Research & Development appropriation, obligation of funds by Navy for Project Sanguine in excess of amount specified in Conference Report for such project does not violate Antideficiency Act, since amount specified in Conference Report is not legally binding unless carried into appropriation act itself.

AUG 15 1974

DIGEST

Under continuing resolution appropriating funds for "projects or activities" conducted in fiscal year 1973 at "rate for operations not in excess of current rate," obligation by Navy for budget line item in excess of FY 1973 expenditure for that budget line item did not violate Continuing Resolution or Antideficiency Act, since GAO does not interpret "project or activity" to mean individual budget line item.

AUG 15 1974

DIGEST

Where reprogramming request was made in apparent violation of appropriation restriction, amounts expended for such request would be a technical violation of Antideficiency Act for which recovery could be made if costs were ascertainable.

AUG 15 1974

DIGEST

Violation of DOD reprogramming directive by Navy failing to get prior approval of Appropriations Committees to reprogram funds among budget line items does not of itself violate Antideficiency Act.