

Decision

Matter of: Department of Defense—Amount Limitations on the Lift and Sustain Program

File: B-332393

Date: May 5, 2021

DIGEST

The Department of Defense (DOD) operates the Lift and Sustain program to reimburse international allies for assistance in military operations. The program is funded through a lump sum appropriation for Operation and Maintenance, Defense-wide. In the conference report accompanying DOD's Fiscal Year 2019 appropriation, the conferees designated \$120 million to the program.

Based on the \$120 million designation, DOD prematurely reported to Congress a potential violation of the Antideficiency Act stemming from a potential cost overrun while operating the program. After review, we conclude the \$120 million designation was not binding on DOD. Moreover, DOD also subsequently determined it did not obligate more than \$120 million for the program. Accordingly, DOD did not violate the Antideficiency Act.

DECISION

This responds to a congressional request for our decision regarding the Department of Defense's (DOD) use of Fiscal Year 2019 (FY19) appropriations to operate its Lift and Sustain (L&S) program and whether DOD violated the Antideficiency Act (ADA). Letter from Chairman and Ranking Member, House Committee on Appropriations, Defense Subcommittee to Comptroller General (July 14, 2020) (Request Letter).¹ DOD prematurely reported a potential ADA violation to its congressional appropriations and oversight committees stemming from its obligations for the program. As a result, we were asked to evaluate whether DOD had actually violated the ADA. As described below, we conclude DOD's operation of the L&S program in FY19 did not violate the ADA.

¹ The chair of the House Committee on Appropriations, Defense Subcommittee changed in January 2021 with the organization of the 117th Congress.

In the conference report accompanying DOD's FY19 appropriation, the conferees included a table in which they designated \$120 million for the L&S program. DOD initially reported a potential violation of the ADA based on the premise that its obligations for the program exceeded this amount. However, as discussed below, this designation did not create a legally binding limitation on the amount available for the L&S program such that obligating in excess of \$120 million for L&S activities would trigger an ADA violation. Notwithstanding, DOD also confirmed it did not actually exceed the \$120 million designation as it had initially reported.

In accordance with our regular practice, we contacted DOD to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to General Counsel, DOD, (Sept. 17, 2020). We received DOD's response on October 22, 2020. Letter from Deputy General Counsel (Fiscal), DOD, to Assistant General Counsel, GAO, (Oct. 22, 2020) (Response Letter).

BACKGROUND

The L&S program is used to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military stability operations in specified countries or for specified operations. Response Letter, at 1. The program was first authorized in 2004 by the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004. Response Letter, at 1; See Pub. L. No. 108-106, § 1106, 117 Stat. 1209, 1214 (Nov. 6, 2003). There is no specific appropriation for the L&S program; however, DOD funds the program out of its Operation and Maintenance, Defense-wide appropriation, which is available, in part, to reimburse key cooperating nations for logistical, military, and other support. Response Letter, at 1; see also Pub. L. No. 115-245, div. A, titles I, IX, 132 Stat. at 2985, 3034.

For FY19, DOD requested \$150 million to fund the L&S program, however, in the conference report, the conferees designated \$120 million for the program instead. H.R. Rep. No. 115-952, at 473 (2018). This designation only appeared in the conference report. Response Letter, at 2. In particular, the conferees included tables throughout the conference report entitled "Explanation of Project Level Adjustments," which specified amounts for various DOD programs, including the L&S program.

In a quarterly report to Congress, DOD stated it "suspected [a] \$29.1 million over-obligation of FY 2019 Lift and Sustain" program appropriations and, thus, may have violated the ADA. DOD, *Quarterly Report to Congress on the Use of Lift & Sustain Authority: Fourth Quarter of Fiscal Year 2019* (2019). DOD based this preliminary determination on the \$120 million designation in the conference report. *Id.*

DISCUSSION

The ADA prohibits the obligation or expenditure of funds in excess or in advance of an appropriation. 31 U.S.C. § 1341. Congress often appropriates amounts to agencies in lump sums, as it did here with DOD's Operation and Maintenance, Defense-wide appropriation. This allows the agency flexibility to execute its appropriation in a manner that accommodates shifting circumstances and needs, provided that the resulting obligations remain consistent with the terms of the lump-sum appropriation and any other applicable law. See B-329964, Oct. 8, 2020. Conversely, where Congress intends to limit agency discretion, it may insert a line item within a lump-sum appropriation, specifying a minimum or maximum amount for a particular program or activity. Cf. B-331888, June 11, 2020. If agency obligations exceed a line item that is determined to have set forth the maximum amount available for a particular purpose, the agency violates the ADA. Cf. B-326941, Dec. 10, 2015 (lump-sum appropriation available to supplement line-item appropriation found to constitute a minimum).

We first analyze whether DOD's L&S program funding was subject to a line-item limitation. We then analyze whether a violation of the ADA occurred based on L&S program obligations.

Funding Limitations on the L&S Program

Generally, "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 the agency." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). However, such expectations can be made legally binding if incorporated by reference into the text of the statute. B-316010, Feb. 25, 2008. If the legislative history is not incorporated by reference into the statute, the agency may still choose to comply with the directive, but is not legally required to. B-323699, Dec. 5, 2012.

In the conference report accompanying DOD's FY19 appropriation act, the conferees designated \$120 million for the L&S program. H.R. Rep. No. 115-952, at 473. No mention of the L&S program or the \$120 million designation was made in the Act itself. See Pub. L. No. 115-245, div. A, title II, title IX, 132 Stat. at 2985, 3034, 3043. Because the designation was in the conference report, it is only legally binding to the extent incorporated by reference into the Act. Here, as the conferees' designation for the L&S program is not included or otherwise referenced in DOD's FY19 appropriations act, it was not incorporated into the Act and remains nonbinding. See Pub. L. No. 115-245, div. A, title II, title IX, 132 Stat. at 2985, 3034, 3043.

There are amount designations included in the conference report that Congress did choose to incorporate into the Act. Specifically, section 8006 of the Act incorporates funding designations for programs, projects, and activities contained in the tables titled "Explanation of Project Level Adjustments" where the amounts appropriated for the designated projects exceed the amounts requested for those projects. Pub. L.

No. 115-245, § 8006, 132 Stat. at 2999. For example, DOD only requested \$72,990,000 for operational test and analysis activities without mentioning an advanced satellite navigation receiver specifically. See H.R. Rep. No. 115-952, at 443. However the conferees designated an additional \$10,000,000 to operational test and analysis activities in the conference report above the initial request for such a receiver. *Id.* Notably, Congress only made the conference amounts that were greater than the amounts requested by the agency legally binding. By limiting the legally binding nature of the incorporation to this narrow subset of the tables, as a legal matter, Congress indicated all other funding amounts specified in the table that did not exceed the amount requested by the agency were to be nonbinding.

Here, the amount specified for the L&S program does not fit the criteria for incorporation by reference under section 8006. DOD originally requested \$150 million for the program, however, the conferees designated \$120 million to the L&S program in the conference report. Because the table *reduced* L&S funding below the budget request and did not provide *more* than requested, the funding designation for the L&S program was nonbinding. While DOD could have chosen to comply with the designation in the legislative history, it was not legally required to do so.

Application of the ADA

The ADA prohibits obligations or expenditures exceeding appropriations limits, whether that limitation is derived from a specific line item or the overall appropriation. See 31 U.S.C. § 1341. Importantly, as discussed previously, because the amount specified in the conference report for the L&S program was not legally binding, and thus not representative of the amount available for L&S activities, an ADA violation could not result based solely on exceeding it.

However, even if the \$120 million designation were binding, an ADA violation still would not have occurred based on the information provided to us by DOD. When DOD initially reported its potential ADA violation, DOD informed Congress it would conduct an investigation into the matter. DOD, *Quarterly Report to Congress on the Use of Lift & Sustain Authority: Fourth Quarter of Fiscal Year 2019* (2019). As a result of the investigation, DOD found that the initial calculations that led to its determination that it exceeded the \$120 million designation were based on multiplying the total number of eligible coalition personnel in country at a certain point in time during each quarter by the rate for full support under the Logistics Civil Augmentation Program contract. Response Letter, at 4. However, not all eligible coalition personnel in country receive support and, of those that do, not all receive full support. *Id.* When calculated based on the actual amounts, the obligations and expenditures fell within \$120 million. *Id.* Further, DOD also confirmed that it did not exceed the overall Operation and Maintenance appropriation due to L&S program obligations, meaning no ADA violation related to L&S program obligations occurred. See Response Letter, at 2.

SUMMARY

For FY19, DOD requested \$150 million for the L&S program, but the conferees designated \$120 million for the program in the conference report. While Congress incorporated some of the amounts included in the Explanation of Project Level Adjustment tables into DOD's appropriations act, it did not incorporate the conferees' designation for the L&S program. This means the designation remained nonbinding on DOD.

DOD prematurely reported a potential ADA violation regarding the L&S program based on the \$120 million designation before completing its investigation into the matter. As discussed above, the \$120 million designation was not binding on DOD, and after DOD reviewed the program's obligations and expenditures, it concluded the program's expenses did not exceed \$120 million. We conclude there is no ADA violation.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong", with a stylized flourish at the end.

Thomas H. Armstrong
General Counsel