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December 19, 2018

The Honorable Richard Shelby
Chairman
Committee on Appropriations
United States Senate

Subject: *U.S. Department of Homeland Security—Impoundment Control Act and Appropriations for the Tenth National Security Cutter*

This responds to a request for our opinion concerning whether the Department of Homeland Security (DHS) violated the Impoundment Control Act (ICA) when it withheld from obligation \$95 million of budget authority. See Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, 88 Stat. 297, 332 (July 12, 1974), *classified at* 2 U.S.C. §§ 681–688; Letter from Senator Thad Cochran, Then-Chairman of the Senate Committee on Appropriations, to Comptroller General (Dec. 22, 2017).

When Congress appropriates funds to the executive branch, the President, unless otherwise authorized to withhold such amounts, must prudently obligate them. The ICA is rooted in this principle, and grants the President strictly circumscribed authority to temporarily withhold funds from obligation by transmitting a special message pursuant to the procedures established by the ICA. Transmission of a special message is the only mechanism through which an agency may withhold budget authority from obligation. Here, the President did not transmit a special message for the funds at issue, but DHS nonetheless withheld \$95 million from obligation. Therefore, DHS violated the ICA. Because we have confirmed that DHS has since obligated the funds, we are not transmitting a report to Congress under the ICA.

In accordance with our regular practice, we contacted DHS 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 Managing Associate General Counsel, GAO, to General Counsel, DHS (May 30, 2018). In response, DHS provided its explanation of the pertinent facts and its legal analysis. Letter from Assistant General Counsel for Fiscal and Appropriations Law, DHS, to Managing Associate General Counsel, GAO (July 20, 2018) (Response Letter).

BACKGROUND

DHS's Appropriations for Fiscal Years 2017 and 2018

The Department of Homeland Security Appropriations Act, 2017, provided appropriations for the Coast Guard's lump-sum Acquisition, Construction, and Improvements appropriation account. Pub. L. No. 115-31, div. F, title II, 131 Stat. 135, 409 (May 5, 2017). This lump-sum appropriation, in turn, contained a line item providing that "\$95,000,000 shall be immediately available and allotted to contract for long lead time materials for the tenth National Security Cutter notwithstanding the availability of funds for production or post-production costs." *Id.* This amount is to remain available until September 30, 2021. *Id.*

On September 14, 2017, the House of Representatives passed H.R. 3354, a bill to provide DHS's fiscal year 2018 appropriations. H.R. 3354, 115th Cong. (as passed by House, Sept. 14, 2017). The bill proposed to rescind \$95 million appropriated in FY 2017 from the Coast Guard's lump-sum Acquisition, Construction, and Improvements appropriation account. H.R. 3354, div. E, title V, § 531(8). The accompanying House report recommended that the \$95 million rescission be applied to "funds provided in fiscal year 2017 for long lead time material for a tenth National Security Cutter that was neither requested by the Coast Guard nor is a requirement." H.R. Rep. No. 115-239, at 46 (2017); see H.R. 3354, div. E, title V, § 541 (stating that any reference in Division E to a "report accompanying this Act" shall be treated as a reference to House Report 115-239").

On November 21, 2017, the Senate Committee on Appropriations released the chairman's recommendation for the FY 2018 Homeland Security Appropriations bill. The draft bill included a line item for \$95 million for long lead time materials (LLTM) for an eleventh National Security Cutter. Senate Committee on Appropriations, *Making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2018, and for other purposes*, at 15, available at www.appropriations.senate.gov/imo/media/doc/FY2018-Homeland-Security-Chairmans-Mark.pdf (last visited Dec. 10, 2018).

Congress enacted DHS's FY 2018 appropriations on March 23, 2018, which included a \$95 million line-item appropriation for LLTM for an eleventh National Security Cutter. See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, title II, 132 Stat. ____ (Mar. 23, 2018). The act did not include the \$95 million rescission proposed in H.R. 3354.¹ *Id.*

¹ The act did rescind other amounts from the Coast Guard's appropriations. Pub. L. No. 115-141, div. F, title II, §§ 539–541, 132 Stat. at ____.

LLTM for the Tenth National Security Cutter

After Congress enacted DHS's FY 2017 appropriations in May 2017, the Coast Guard began the process of procuring LLTM for the tenth National Security Cutter. Response Letter, at 2. The Coast Guard completed price negotiations with the contractor around December 2, 2017, with such pricing expiring on December 31, 2017. *Id.*, at 2. At that time, DHS's FY 2018 appropriations remained pending before Congress. This included H.R. 3354, which, as explained above, would have rescinded amounts from the Coast Guard's lump-sum Acquisition, Construction, and Improvements appropriation account.

After the completion of price negotiations, the Coast Guard began to review what impact, if any, the proposed lump-sum rescission in H.R. 3354 would have on the Coast Guard's programs. *Id.*, at 2 (outlining DHS's review of "whether the House bill's proposed rescission might impact [the Coast Guard's] programs if it were to be enacted after the [Coast Guard] entered into a contract for the [National Security Cutter] LLTM"); *id.*, at 4 ("[D]uring the late December 2017 time period the Department did not obligate the LLTM line item funds while it worked through the issues and concerns arising from the House's proposed rescission not being resolved prior to the expiration of the LLTM contractor's price proposal."). The Coast Guard stated that this impact might include "the termination of any contracts entered into for LLTM and associated costs of such termination" and "the possible need to rescind funds from other [Coast Guard Acquisition, Construction, and Improvements] lump sum balances in order to satisfy the rescission requirement." *Id.*, at 2–3. The Coast Guard also reviewed "whether it would strain relations with Congress to obligate the LLTM line item funds after one chamber of Congress had passed an appropriations bill that intended to rescind those amounts while the other chamber manifested disagreement with that rescission, prior to the enactment of a full-year appropriation resolving that apparent conflict." *Id.*, at 3.

DHS stated that, absent the rescission pending before Congress in H.R. 3354, the Coast Guard "could possibly have finalized the LLTM contract modification on or about December 29, 2017." *Id.*, at 9. The Coast Guard ultimately finalized the contract modification, and obligated amounts, for the LLTM line item on March 29, 2018. *Id.*, at 4.

DISCUSSION

Even though DHS indicated that it could have obligated funds for the National Security Cutter LLTM in December 2017, it did not do so. At issue here is whether DHS's withholding of these amounts violated the ICA.

Under the Constitution, Congress enacts laws, and the President must take care to faithfully execute the terms of those laws, including appropriations acts. U.S. Const. art. I, §§ 1, 7 (Bicameral Requirement); *id.*, art. I, § 7, cls. 2, 3 (Presentment Clauses); *id.*, art. II, § 3 (Take Care Clause). Thus, when Congress appropriates money to the executive branch, the President is required to obligate the funds unless

otherwise authorized to withhold them. See B-330330, Dec. 10, 2018; B-330330.1, Dec. 10, 2018; B-329092, Dec. 12, 2017; B-203057, Sept. 15, 1981; see also *Train v. City of New York*, 420 U.S. 35, 41 (1975). It is within this framework that Congress enacted the ICA.

The ICA grants the President strictly circumscribed authority to temporarily impound—that is, withhold the obligation of—appropriated funds in certain circumstances. See 2 U.S.C. §§ 681–688. Pursuant to the ICA, prior to withholding amounts, the President must notify Congress by transmitting a “special message.”² Transmission of a special message provides the only mechanism through which an agency may withhold budget authority from obligation. 2 U.S.C. §§ 683–684; B-329092, Dec. 12, 2017. The ICA outlines what information the special message must include, such as the amount of budget authority at issue, the relevant account, and the “specific project or governmental functions involved.” 2 U.S.C. §§ 683(a), 684(a).

Absent the transmittal of a special message, it is improper for an agency to withhold budget authority. For example, an agency may not withhold budget authority in anticipation of congressional action on a cancellation proposal in the President’s budget request. B-329092, Dec. 12, 2017; B-308011, Aug. 4, 2006; B-307122, Mar. 2, 2006; B-307122.2, Mar. 2, 2006. A legislative proposal from the President, without additional action from Congress, is not law and does not authorize the executive branch to withhold funds. U.S. Const., art. I, § 7, cls. 2, 3. See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); GAO, *Use and Impact of Rescission Procedures*, GAO/T-OCG-92-5 (Washington, D.C.: Sept. 25, 1992), at 2–3. Under the Constitution, a bill proposing to rescind budget authority may become a law only after both chambers of Congress pass it in identical form for presentment to the President. U.S. Const., art. I, § 7, cl. 2, 3 (Presentment Clause and Bicameral Requirement). See *Clinton*, 524 U.S. at 438 (“There is no provision in the

² The ICA separates impoundments into two exclusive categories: a *deferral* is a temporary postponement of the obligation of budget authority, while a proposed *rescission* asks Congress to permanently cancel budget authority. 2 U.S.C. § 684 (deferrals); 2 U.S.C. § 683 (rescissions).

If the Comptroller General becomes aware of an unreported impoundment, he or she must report the impoundment and any available information concerning it to both Houses of Congress. 2 U.S.C. § 686(a). Since the enactment of the ICA, our practice has been to review withholdings brought to our attention by concerned Members of Congress or congressional committees, intended grant or contract recipients, or auditors. See, e.g., B-329092, Dec. 12, 2017; B-320091, July 23, 2010; GAO, *Comments on Unreported Impoundment of DOD Budget Authority*, GAO/OGC-92-11 (Washington, D.C.: June 3, 1992). In those situations, we review the agency’s actions to determine if it has complied with the ICA and to confirm that the funds are ultimately made available for obligation.

Constitution that authorizes the President to enact, to amend, or to repeal statutes.”); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994) (“Congressional inaction cannot amend a duly enacted statute.”); *INS v. Chadha*, 462 U.S. 919, 954 (1983) (“Amendment and repeal of statutes, no less than enactment, must conform with Art. I.”). See also B-322162, Sept. 19, 2011 (finding that permanent legislation in an appropriations act imposed an affirmative requirement on an agency to rescind funds).

In this case, only one chamber of Congress had passed the bill that proposed the rescission of \$95 million from the Coast Guard’s lump-sum Acquisition, Construction, and Improvements appropriation account. H.R. 3354. In the same way a cancellation proposal does not constitute a duly enacted law, an unenacted bill such as H.R. 3354 is not a law and, on its own, does not provide a legal basis for withholding funds from obligation. See B-329092, Dec. 12, 2017; B-308011, Aug. 4, 2006; B-307122, Mar. 2, 2006; B-307122.2, Mar. 2, 2006.

Here, the President did not transmit a special message pertaining to the amounts at issue, but DHS nevertheless withheld the obligation of funds for the LLTM line item while it reviewed the potential impact of the proposed rescission pending before Congress. Response Letter, at 2–3, 4, 6 (describing DHS’s review of the possible effect of the pending rescission on the Coast Guard’s programs and its relations with Congress, potential contract termination costs, and “legally viable options concerning the LLTM line item funds”). Though it is reasonable for an agency to consider the potential effects of future funding levels in its program planning, in this case DHS withheld the obligation of funds for the LLTM line item while it did so. See B-207374, July 20, 1982. Absent the transmission of a special message, such a withholding violates the ICA.

Effect of Report Language

We note that, even if H.R. 3354 had been enacted in the form in which it passed the House, the bill language would not have obviated the Coast Guard’s requirement to satisfy the LLTM line item.³ As written, H.R. 3354 would have rescinded funds from the Coast Guard’s lump-sum Acquisition, Construction, and Improvements appropriation account without reference to the LLTM line item; it was only the accompanying committee report that recommended the rescission specifically for the LLTM line item. H.R. Rep. No. 115-239, at 46 (2017). Statements, explanations, recommendations, or tables contained in committee reports or in other legislative history “cannot supersede an existing statutory provision that establishes a legally binding amount that an agency may dispose of as an available appropriation.”

³ DHS concurs with this conclusion. See Response Letter, at 2 n.3 (“It is unlikely that the bill’s language, as drafted, even in conjunction with the House Report language, would have been sufficient to rescind the LLTM line item, because the line item is not specifically identified in the bill’s rescission provision.”).

B-278121, Nov. 7, 1997; *see American Hospital Ass'n v. NLRB*, 499 U.S. 606, 616 (1991) (statements in committee reports do not have the force of law, “for the Constitution is quite explicit about the procedure that Congress must follow in legislating”); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191 (1978) (“Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress . . .”). We have long recognized that recommendations in committee reports do not legally bind an agency unless they are incorporated, either expressly or by reference, in an appropriations act itself or in some other statute.⁴ *See, e.g.*, B-323699, Dec. 5, 2012; B-316760, Feb. 19, 2009; B-183851, Oct. 1, 1975.

In this case, the Coast Guard’s FY 2017 Acquisition, Construction, and Improvements appropriation required that the Coast Guard obligate \$95 million for LLTM for the tenth National Security Cutter. In September 2017, the House passed H.R. 3354, which proposed to rescind \$95 million of funds appropriated in FY 2017 from the Coast Guard’s lump-sum Acquisition, Construction, and Improvements appropriation account. The House report accompanying H.R. 3354 recommended rescission of the LLTM line item, but the report language was not incorporated in H.R. 3354 itself and, thus, did not have legal effect. Given the requirement enacted in DHS’s FY 2017 appropriations act to obligate funds for the LLTM line item and the fact that unincorporated report language does not legally bind an agency, the committee report language accompanying the proposed lump-sum rescission would not have provided legal justification for the Coast Guard to withhold the LLTM funds even if H.R. 3354 had been enacted.

Delay was not Programmatic

Although DHS acknowledges that it delayed obligating amounts, it asserts that this delay was programmatic and, therefore, permissible. Response Letter, at 6. We disagree.

We recognize that, even where the President does not transmit a special message pursuant to the procedures established by the ICA, it is possible that a delay in obligation may not constitute a reportable impoundment. *See* B-329092, Dec. 12,

⁴ This is not to imply that an agency should disregard the legislative history that accompanies its authorizing legislation and its appropriations. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (“And, of course, we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences.”); *Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984) (explaining that “our separation of powers makes such informal cooperation” between congressional committees and executive branch officials “much more necessary”); B-217722, Mar. 18, 1985 (noting that an agency has “a practical, though not a legal, duty to abide by [Congress’s] expressions of intent” and ignores such expressions “at the peril of strained relations with the Congress”).

2017; B-222215, Mar. 28, 1986. Agencies must take reasonable and necessary steps to implement a program, and such steps may cause funds to temporarily go unobligated. This is known as a “programmatic delay” and does not violate the ICA. GAO, *Impoundment Control: President’s Third Special Impoundment Message for FY 1990*, GAO/OGC-90-4, (Washington, D.C.: Mar. 6, 1990), at 9–10 (delay in awarding a contract due to design modification did not constitute an impoundment); B-200769, Nov. 7, 1980 (agency’s procurement process was not “so unusual or unreasonably long” as to constitute an impoundment); B-115398.51, Sept. 28, 1976 (no impoundment where failure to obligate was due to an “historically low” number of loan applications). In determining whether a delay is programmatic in nature, we evaluate the facts and circumstances involved, including the reason for the agency’s failure to obligate the funds. B-207374, July 20, 1982; B-204905, Nov. 2, 1981.

DHS states that it delayed obligating amounts for the LLTM line item while it conducted a legal review. In certain situations, we have found a delay to be programmatic where the agency delayed the obligation of funds while it reviewed whether a statutory condition precluded the obligation of budget authority. For example, the Office of Management and Budget (OMB) delayed the apportionment of certain funds while it reviewed whether a statutory limit on the transfer of funds applied to the appropriation at issue. B-291241, Oct. 8, 2002. We concluded that this delay was programmatic because OMB participated in a “vigorous and healthy internal legal discussion” with the agency based on these concerns and subsequently approved the agency’s revised apportionment requests. *Id.* In another case, the Department of State (State) was required to ensure that a program’s practices satisfied certain statutory conditions before making funds from a lump-sum appropriation available for that program. B-290659, July 24, 2002. When State delayed the obligation of funds due to uncertainty as to whether the statutory conditions had been met, we concluded that the delay did not constitute an impoundment. *Id.*

In those cases, both OMB and State delayed the obligation of funds while reviewing whether an agency could legally obligate funds in light of existing statutory conditions. Here, however, DHS has not cited any law that would have prevented DHS from legally obligating the funds in question. Rather, DHS delayed the obligation of funds while it considered the impact of a bill that had been passed by only one chamber of Congress. As H.R. 3354 was not a law and, thus, did not legally bind the agency, it could not have presented a statutory bar to the Coast Guard’s obligation of funds. Accordingly, we find that the Coast Guard’s review of the unenacted legislation here did not constitute a programmatic delay.

DHS further contends that its review of the potential impact of the proposed rescission of the LLTM line item funds “[is] not materially different from the prior and valid administrative activities undertaken by agencies in program execution (e.g.

planning, design, market research, drafting of specifications, advertising requests for proposals, etc.)” Response Letter, at 8. We disagree. In the cases in which we found that an agency’s delay in obligating funds for a contract constituted a programmatic delay, the administrative activities undertaken by the agency were related to the processes underlying the procurement and award of the contract itself. See GAO, *Impoundment Control: President’s Third Special Impoundment Message for FY 1990*, GAO/OGC-90-4, (Washington, D.C.: Mar. 6, 1990), at 9–10; B-221412, Feb. 12, 1986; B-200769, Nov. 7, 1980.

For example, the Veterans Administration (VA) failed to award eight contracts by the statutory deadlines outlined in its 1984 and 1985 appropriations acts. B-221412, Feb. 12, 1986. In that case, VA did not award the contracts within the time limitations imposed by statute as a result of concerns related to the award of the contract itself, such as internal workload constraints, ongoing negotiations, changes in project scope, proposal deficiencies, and unreasonably high bid proposals. *Id.* Because program- and procurement-related concerns caused the agency’s delay, we found that the failure to obligate the funds by the statutory deadline did not constitute an impoundment. *Id.*

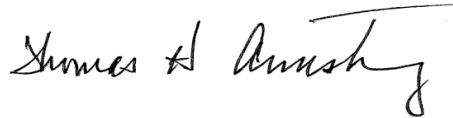
Unlike the delays in the VA case, which resulted from concerns related to the award of certain contracts, the Coast Guard’s delay was not related to the procurement for the LLTM line item itself. Indeed, DHS stated that it could have obligated funds for the contract in December 2017. Instead, DHS delayed the obligation of funds while it reviewed the potential consequences of a proposed lump-sum rescission in an unenacted bill. The proposed lump-sum rescission in H.R. 3354 did not present an impediment to the timely obligation of funds for the advance procurement of LLTM. See B-241514.13, Oct. 2, 1991 (delay was not programmatic where agency did not award a contract due to a lack of guaranteed future funding). Because DHS’s withholding was not related to the award of the contract itself, it did not constitute a programmatic delay.

CONCLUSION

An agency may withhold budget authority from obligation only if the President has transmitted a special message to Congress. Because DHS withheld \$95 million from obligation without the President transmitting a special message to Congress, and there was no law rescinding the budget authority, DHS violated the ICA. Because our purpose is to ensure that funds are made available for obligation, and we have confirmed that the agency has obligated these funds, we are not transmitting a report to Congress under the ICA. See B-329092, Dec. 12, 2017.

If you have any questions, please contact Julie Matta, Managing Associate General Counsel, at (202) 512-4023, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

Sincerely,

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a long horizontal line extending from the top of the "y" in "Armstrong".

Thomas H. Armstrong
General Counsel