

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

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FILE: B-115398**DATE:** December 1, 1983**MATTER OF:** Propriety of Energy Department's
terminating the Clinch River Breeder
Reactor Project**DIGEST:**

Congress' failure to approve fiscal year 1984 monies for the Clinch River Breeder Reactor Project either specifically in appropriations or in legislative history, allows the Energy Department to invoke the provision set forth in section 4(i) of the Project justification data and in its contracts calling for termination when there is "insufficiency of project funds to permit the effective conduct of the project." B-115398.33, June 23, 1977; B-164105, December 5, 1977; and B-164105, March 10, 1978, are distinguished.

A Department of Energy certifying officer asks whether available fiscal year 1983 appropriations intended for the Clinch River Breeder Reactor Project ^{1/} (the Project) may be used for terminating the Project. For the reasons given below, we do not object to that use. The situation discussed in B-115398.33, June 23, 1977, B-164105, December 5, 1977 and B-164105, March 10, 1978, is distinguishable from the present case, as will be explained later.

Background

The Project began in 1969. In that year, pursuant to section 106 of Public Law 91-44, 83 Stat. 46, 47, the Atomic Energy Commission was authorized to study the ways in which a liquid metal fast breeder reactor demonstration project could be designed. The legislation required the Commission to submit criteria for the Project planning stage to the Joint Committee on Atomic Energy. The following year, the Congress expanded the Project to authorize the design, construction, and operation of a breeder reactor. Pub. L. No. 91-273, 84 Stat. 299, 300-01. The 1970 authorization required the Commission to submit criteria for the Project's construction phase to the Joint Committee for a 45 day lie-and-wait period.

1/ Often referred to as the CRBRP.

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In 1975, the authorizing language was amended again, though not in substance. Pub. L. No. 94-187, 89 Stat 1063, 1069-70. The 1970 authorization, as amended in 1975, provides the current authority for the project.^{2/}

Pursuant to the 1975 amendment, the Energy Research and Development Administration (ERDA) submitted criteria and justification data to the Joint Committee on Atomic Energy. The criteria called for the design, construction and operation of a liquid metal fast breeder reactor plant and set forth design requirements and plant objectives. The justification data contain much of the same information, and also

2/ In pertinent part, the text reads:

"Sec. 106. LIQUID METAL FAST BREEDER REACTOR DEMONSTRATION PROGRAM--FOURTH ROUND.--(a) The Energy Research and Development Administration (ERDA) is hereby authorized to enter into cooperative arrangements with reactor manufacturers and others for participation in the research and development, design, construction, and operation of a Liquid Metal Fast Breeder Reactor powerplant, in accordance with criteria approved by the Joint Committee on Atomic Energy, without regard to the provisions of section 169 of the Atomic Energy Act of 1954, as amended. Appropriations are hereby authorized * * * for the aforementioned cooperative arrangements as shown in the basis for arrangements as submitted in accordance with subsection (b) hereof * * *

"(b) Before ERDA enters into any arrangement or amendment thereto under the authority of subsection (a) of this section, the basis for the arrangement or amendment thereto which ERDA proposes to execute * * * shall be submitted to the Joint Committee on Atomic Energy, and a period of forty-five days shall elapse while Congress is in session. * * * Provided, further, That such arrangement or amendment shall be entered into in accordance with the basis for the arrangement or amendment submitted as provided herein: * * *

The Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 577-78, directed the Department of Energy to assume the functions of the Energy Research and Development Administration.

provide an analysis of the relationship and responsibilities of the principal parties involved in the Project.

Section 4(i) of the justification data provides that one of the criteria justifying termination prior to the Project's completion is "insufficiency of project funds to permit the effective conduct of the project." (The principal Project Agreement contains substantially the same provision.) Both the criteria and justification data were approved by the Joint Committee. Modifications in the Proposed Arrangements for the Clinch River Breeder Reactor Demonstration Project: Hearings Before the Joint Comm. on Atomic Energy, 94th Cong., 2d Sess. 4, 522 (April 14 and 29, 1976). Although the justification data are not specifically mentioned in the authorizing legislation, as are the criteria, the colloquy between former Congressman Moss and Joint Committee Counsel William Parler during the cited hearings suggest that they had the same status:

"Representative Moss. If there is a conflict between the contract [the Cooperative Arrangement] provisions and the criteria, which controls?

"Mr. Parler. The criteria and the justification data which the Committee approved." Modifications in the Proposed Arrangements for the Clinch River Breeder Reactor Demonstration Project: Hearings Before the Joint Comm. on Atomic Energy, 94th Cong., 2d Sess. 4 (April 14 and April 29, 1976).

The following year, Senator Henry Jackson, then Joint Committee Vice-Chairman, asked us about the propriety of the President's proposal (1) to defer some \$31.8 million in budget authority intended for the Project, and, (2) to significantly curtail the Project. In furtherance of the proposal, ERDA submitted amended criteria and justification data to the Joint Committee, essentially calling for the Project's discontinuance.

In B-115398.33, June 23, 1977, we concluded that appropriated funds could not be spent on curtailing the Project. We found that the criteria already approved by the Joint Committee, including the stated objective of successfully completing, operating and demonstrating the usefulness of a breeder reactor powerplant, were as much a part of the authorizing legislation "as if they were explicitly stated

in the statutory language itself." Proposed amendments to the criteria contemplated by the authorizing legislation were only those which would have been consistent with completing the Project. Thus, we found that by both expending appropriations intended for the Project on, and attempting to have the Joint Committee ^{3/} approve amended criteria and justification data calling for, the Project's curtailment, ERDA would have been in conflict with the authorizing legislation. Moreover, we stated that such expenditures would have violated a statutory requirement that appropriations be spent only on the objects for which they were made, 31 U.S.C. § 1301. In two subsequent decisions, we sustained this conclusion, particularly in the light of a Supplemental Appropriation Act for FY 1978 (Pub. L. 95-248, March 7, 1978), which specifically earmarked \$80,000,000 for the Project.

Between 1975 and 1983, first ERDA, and then its successor, the Department of Energy, continued the Project. The Project usually has been funded from lump-sum appropriations for operating expenses, e.g., Pub. L. No. 95-96, 91 Stat. 797, or operating expenses for energy supply, research and development activities, e.g., Pub. L. No. 97-88, 95 Stat. 1135, 1142: rarely has there been a specific appropriation for the Project. Through fiscal year 1983, the amounts intended for the Project have been indicated in committee reports accompanying the appropriation act which provided the lump-sum for operations. For example, in fiscal year 1977, the Committee report of both houses designated \$534,760,000 for the Project. H.R. Rep. No. 1223, 94th Cong., 2d Sess. 20 (1976); S. Rep. No. 960, 94th Cong., 2d Sess. 16 (1976). In fiscal 1984, however, no monies have been so designated.

The Department has now informed us that it intends to terminate the Project, and, that as of October 31, 1983, it had on hand some \$47 million, obligated but unexpended, and \$237,000 unobligated, no-year funds, designated for the Project but which it would like to use for termination instead.

^{3/} The Joint Committee subsequently was abolished by Pub. L. No. 95-110, 91 Stat. 884.

Discussion

The Department has presented a number of arguments supporting its position that it should be able to use the mentioned funds for termination activities. First, it maintains that our 1977 decision overlooked the fact that the legislation authorizing the Project was discretionary rather than mandatory. Thus, it suggests that the Energy Department is not legally required to carry out the Project and may terminate it. A Departmental memorandum also contends that Congress' support for the Project has changed substantially, and by not earmarking monies for the Project in fiscal 1984, Congress showed its intent not to continue the Project to completion. The same memorandum suggests that the termination provision in the justification data and the contract permits the Department to end the Project if sufficient funds are not available to continue it effectively.

We agree with the Department of Energy that the legislation authorizing construction of a breeder reactor was not phrased in mandatory terms. Had the authorizing act provided that the agency "shall" or "must" carry out this Project, we would have interpreted the ensuing lump-sum appropriations as incorporating this requirement by reference. See B-159993, September 1, 1977. In the case of the breeder reactor program, section 106 of Pub. L. 91-273, as amended, authorized but did not compel the agency to undertake the Project in the first place.

There was no disagreement with this principle in B-115398.33, June 23, 1977. However, by the time the question of the authority to terminate came before us, the agency had already decided to enter into the program. It had developed detailed criteria and justification data, subsequently approved by the Joint Committee, and had entered into firm cooperative arrangements with three contractors consistent with these criteria and data. It was our view that the agency's proposals to continue the program only with respect to systems design activities did "not fulfill major objectives of the existing JCAE approved statutory criteria; nor the object of the authorization itself--to operate an LMFBR demonstration plant." In other words, having decided to undertake the Project, the agency was bound to proceed in accordance with the approved criteria and justification data.

This view was further strengthened by the provisions of the fiscal year 1978 supplemental appropriations act, which we considered in B-164105, December 5, 1977 and March 10, 1978. (The Act had not yet been signed into law when we wrote the December 5 decision but was subsequently enacted as Public Law 95-240 on March 7, 1978.) That Act as mentioned earlier, specifically earmarked \$80 million for the Project. The legislative history made it quite clear that the funds were intended to further the statutory objectives of the authorization act and could not legally be spent for any other purpose.

Congressional support for the Project has changed substantially since we rendered our earlier decisions. Concern about the Project's continuance has been reflected in committee reports for several years. Thus, the Conference and the Senate Reports accompanying the Energy and Water Development Appropriation Act, 1982, Pub. L. No. 97-88, 95 Stat. 1135, both suggested that funds intended for the Project could be expended on an alternate project as might be approved by authorizing legislation. H.R. Rep. No. 345, 97th Cong., 1st Sess. 24 (1981); S. Rep. No. 256, 97th Cong., 1st Sess. 94 (1981). The following year, the Conference report accompanying the Joint Resolution Continuing Appropriations for Fiscal Year 1983, Pub. L. No. 97-377, 96 Stat. 1830, called for the continuation of funding at fiscal year 1982 levels, but directed that the Energy Department "not initiate construction of any permanent facility structures or place any additional major equipment orders during the period of this resolution." H.R. Rep. No. 980, 97th Cong., 2d Sess. 186 (1982). The report also directed that up to a million dollars be available to vigorously explore proposals, including a reconsideration of the original cost-sharing arrangement, that would reduce Federal budget requirements for the Project or Project alternate, and secure greater participation from the private sector. Id.

Thus far in fiscal 1984, no monies have been designated for the Project. The Conference report accompanying the Joint Resolution Continuing Appropriations for Fiscal Year 1984, Pub. L. No. 98-107, 97 Stat. 733, states:

"The Conferees have deferred consideration, without prejudice, of additional funding for the CRBR project. Until Congress acts, the Department should maintain all options and not undertake any new activities relating to CRBR including an initiation of any construction." H.R. Rep. No. 397, 98th Cong., 1st Sess. 10 (1983).

The language in the House and Senate reports accompanying the fiscal year 1984 Energy and Water Development Appropriations bill, H.R. 3132, 98th Cong., 1st Sess., is similar. H.R. Rep. No. 217, 98th Cong., 1st Sess. 81; S. Rep. No. 153, 98th Cong., 1st Sess. 103-04 (1983).

There is some conflict in the Congressional floor debates about Congress' intention, as expressed in the cited reports. Thus, Congressman Whitten, Chairman of the House Appropriations Committee, appeared to agree with Congressman Ottinger's ^{4/} suggestion that the language in the Conference report that applied to Clinch River was not intended to overcome the Secretary of Energy's position that if funds were not designated for the Project by October 1, 1983, the Project would effectively be in termination. 129 Cong. Rec. H7814-15 (daily ed. Sept. 30, 1983). On the other hand, in response to Senator Baker's ^{5/} question about the Senate Appropriations Committee's intentions, Senator Hatfield, Chairman of that committee, said that "[b]y use of funds previously appropriated for CRBR but unobligated or private contributions, the project should be continued so as to maintain all options of the Congress in considering the DOE's August 1, 1983, CRBRP alternative financing plan during the period of this continuing resolution" and "the Department should take no action * * * that would constrain or inhibit proceeding with the project with appropriated funds or alternative financing, should Congress act to continue funding for the project." 129 Cong. Rec. S13183-84 (daily ed. Sept. 29, 1983); 129 Cong. Rec. S13341-42 (daily ed. Sept. 30, 1983) (Colloquy between Senators Baker and Hatfield).

Soon after passage of the Joint Resolution Continuing Appropriations for Fiscal Year 1984, proponents of the Project attempted to amend a 1984 Supplemental Appropriations bill, H.R. 3959, 98th Cong., 1st Sess, to provide \$1.5 billion to complete the Project. However, by a vote of 56-40, the Senate tabled the amendment. 129 Cong. Rec. S14613-44 (daily ed. Oct. 26, 1983).

^{4/} Congressman Ottinger is Chairman of the House Subcommittee on Energy Conservation and Power, Committee on Energy and Commerce.

^{5/} Senator Baker has strongly advocated continuing the Project.

The statements in the committee reports and floor debate discussed above show that Congress' support for the Project has diminished considerably from that demonstrated in 1977. By suggesting an alternate Project in fiscal year 1982, and directing limitations on construction and placement of major equipment orders in fiscal year 1983, the Congress showed its concern with how the Project was proceeding. Moreover, by not designating any funds for the Project in fiscal year 1984, and by directing that the Department not undertake new Project activities, the Congress demonstrated further erosion of its support for the Project. The tabling of the alternate financing plan during consideration of the FY 84 Supplemental Appropriations bill appears to be the final blow, although we acknowledge that it is not clear from the legislative histories of the Joint Resolution Continuing Appropriations for Fiscal Year 1984 and the 1984 Supplemental Appropriations bill whether the Congress intends the Energy Department to proceed with the Project on a limited basis, adopt an alternate, or begin termination. Nevertheless, we do not think the Department is unreasonable in concluding that further funding for the Project is not likely to be forthcoming. We think this provides the Department with a legal basis for terminating the Project.

As mentioned earlier, there is a specific termination provision in the justification data, and in the contractual documents as well, allowing for termination prior to the Project's completion in the event of "insufficiency of project funds to permit the effective conduct of the project." As monies usually have not been specifically appropriated for the Project, we read the quoted language as encompassing Congress' failure to include a specific appropriation for the Project in either an appropriation act, or legislative history indicating an intent that certain funds from a lump-sum appropriation are intended for the Project. The funding situation was very different at the time we issued our earlier decisions. The agency could not possibly have invoked the termination provisions, discussed above, since funds were clearly intended to remain available for the project.

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Accordingly, for the reasons given, we think the Department of Energy may use available 1983 appropriations to terminate the Clinch River Fast Breeder Reactor Project. Our decisions in B-115398.33, June 23, 1977, B-164105, December 5, 1977, and March 10, 1979, are distinguished.

for Milton J. Fowler
Comptroller General
of the United States