8736

Herrick DOM

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

B-114839

JAN 3 1979

The Honorable George Hansen
House of Representatives

Dear Mr. Hansen:

This is in response to your letters of November 6 and 17, and December 5, 1978, requesting our investigation and legal determination of the propriety of construction by the Department of the Army (Army) in the Panama Canal Zone (Canal Zone) for relocation of military installations in anticipation of the effective date of the recently ratified Panama Canal Treaties. An additional December 4, 1978, letter, from you, cosigned by 19 other Congressmen, summarizes and reiterates your concerns.

Your letters raise two principal questions; first, whether it is legal for the Army to use its appropriated funds for the realignment of military bases in the Canal Zone; and second, the propriety of the award of a fixed price contract without advertisement for bids to J. A. Jones Construction Company to undertake the construction needed to realign those bases. Pursuant to an agreement with your office, this response will be limited to the first point. We have written to the Army for information concerning the J. A. Jones contract, and will report on it later.

In your letters, you state that section 817 of the Department of Defense (DOD) Appropriation Authorization Act, 1979, Pub. L. No. 95-485 (October 20, 1978), would prohibit the Army from using any of its funds for the realignment of military installations in the Canal Zone in implementation of the Panama Canal Treaties. The determination by Deputy Secretary of Defense C. W. Duncan, Jr., on October 4, 1978, to use $10.9 million of funds for military construction purposes for implementing the Panama Canal Treaties, is, in your view, in defiance of section 817 and its legislative history.

Section 817 of Pub. L. No. 95-485 states:

"None of the funds authorized to be appropriated by this Act shall be used for the realignment of any military installation in the Canal Zone unless such use is consistent with the responsibility of, and necessity

Letter

O 03071

for, the United States to defend the Panama Canal or with legislation which may be enacted to implement the Panama Canal Treaties of 1977." (Emphasis added.)

Some discussion of the history of section 817 is necessary. During floor debate on H.R. 10929, 95th Congress, the 1979 Defense authorization bill, as reported by the House Armed Services Committee, you introduced an amendment. This amendment, adopted on the House floor, eventually became section 813 of H.R. 10929. It provided as follows:

"Notwithstanding any other provision of law, none of the funds authorized to be appropriated for the Department of Defense by this or any other Act shall be used directly or indirectly for the purpose of effecting any force reduction or base realignment in the Panama Canal Zone in support of implementation of the Panama Canal Treaties approved by the United States Senate in 1978 without a specific Act of Congress." (Emphasis added.) See 124 Cong. Rec. H 4560-1 (daily ed., May 24, 1978).

There was no similar provision in S. 3486, 95th Congress, the Senate-passed Defense authorization bill. However, Senate conferees offered an amendment which restricted the expenditure of funds authorized to be appropriated in the bill for the realignment of any military installation in the Canal Zone (but not for "force reduction") to such use as is consistent with the responsibility and necessity for the United States to defend the Panama Canal. It also eliminated the broad applicability of the restriction to funds authorized to be appropriated "by this or any other act." The House conferees concurred. The conferees' language is identical to the language of section 817 of the Act. See H.R. Rep. No. 95-1402, 56 (1978).

The bill agreed to in conference and passed by both Houses (H.R. 10929) was vetoed. When the House failed to override the veto, S. 3486 was offered as a substitute and was ultimately enacted. S. 3486 was modified to meet the President's objections but was generally identical to H.R. 10929. In particular, as noted above, section 817 of S. 3486 and of the Act is identical to section 813 of H.R. 10929 as agreed to in conference.

The language change made by the conferees to what is now section 817 of the Act supports the view that the prohibition against the use of DOD funds for the realignment of military installations in the Canal

Zone is applicable only to those funds authorized to be appropriated by that particular authorization act. H. R. Rep. No. 95-1402, supra; 124 Cong. Rec. H 11495-6 (daily ed., October 4, 1978) (colloquy between Rep. Price and Rep. Hansen). Thus section 817 restricts the use of funds authorized to be appropriated for procurement of aircraft, missiles, torpedoes and other weapons, and for research, development, testing and evaluation, but does not appear to cover any other DOD activity or expenditure.

The Army states that the work being undertaken and accomplished for the realignment of military installations in the Canal Zone will be accomplished, not with funds authorized by Pub. L. No. 95-485, the 1979 Defense Appropriation Authorization Act, but pursuant to the authorization contained in the emergency construction provision of the Military Construction Authorization Act, 1978, Pub. L. No. 95-82, section 402, 91 Stat. 369 (1978), and that the work is financed from appropriations under the Military Construction Appropriation Act, 1978, Pub. L. No. 94-101, 91 Stat. 837. (By virtue of section 111 of the Military Construction Appropriation Act for FY 1979, Pub. L. No. 95-374, the 1978 funds remain available for the same period as the 1979 funds.) We have been informed that no funds obligated for the Army's current activities in the Canal Zone which you question have been appropriated pursuant to the DOD Appropriation Authorization Act, 1979, supra. We can find no similar prohibition against the expenditure of funds for the realignment of bases in the Canal Zone in the language of the Military Construction Authorization or Appropriation Acts, supra, from which funding for the questioned activities derives.

Section 402(a) of Pub. L. No. 95-82, supra, contains the emergency construction authorization relied on by the Army. This section states:

> "The Secretary of Defense may establish or develop installations and facilities which he determines to be vital to the security of the United States and, in connection therewith, may acquire, construct, convert, rehabilitate, or install permanent or temporary public works, including land acquisition, site preparation, appurtenances, utilities, and equipment, in the total amount of $20,000,000. The Secretary of Defense, or his designee, shall notify the Committees on Armed Services of the Senate and House of Representatives, immediately upon reaching a final decision to implement, of the cost of construction of any public works undertaken under this section, including real estate actions pertaining thereto." (Emphasis added.) See also Pub. L. No. 95-356, section 102, 92 Stat. 567 (1978).

The notification required by section 402(a) of the Military Construction Authorization Act of 1978, supra, was given on October 4, 1978, by Deputy Secretary of Defense Duncan to the Armed Services Committees of both the Senate and the House. This is the only statutorily required notification required for the expenditure of funds for emergency construction, although a notification was also provided to the House and Senate Appropriations Committees.

The Conference Report on the 1979 Military Construction Appropriation Act, Pub. L. No. 95-374, 92 Stat. 707 (1978), includes the following comment on the use of military construction funds for Canal Zone purposes.

> "Panama Canal: The conferees agree that funding for military construction in the Panama Canal Zone should be the subject of review by the House and the Senate, but that limited prior approval reprogramming of emergency construction required for the realignment of military installations consistent with the responsibility of the United States to defend the Canal and provide for the security of U.S. personnel may be necessary before a budget amendment or supplemental could be acted on by the Congress. In such event, the requirement and emergency nature of such construction must be certified by the President of the United States before submission to the Committees on Appropriations of the House and Senate." H. Rep. No. 95-1495, 3 (1978).

The Act does not incorporate this requirement. President Carter issued a memorandum for the Secretary of Defense on October 3, 1978, citing the above language and certifying that the construction of certain relocation projects in the amount of $10.9 million is essential to the national interests of the United States. As previously mentioned, this certification, together with the statutorily required notice, was submitted to the aforementioned Committees.

While Chairman McKay of the House Military Construction Appropriations Subcommittee stated that "the committee has denied the Department's request" of October 4, 124 Cong. Rec. H. 12370, (daily ed., October 11, 1978), the relevant statutory language does not require approval from the Appropriations Committees. See section 402(a), Pub. L. No. 95-82, supra. The legislative history indicates that Chairman McKay felt that there should be congressional approval of such expenditures (see 124 Cong. Rec. H. 8865 (daily ed.,

August 17, 1978) (colloquy between Rep. Bauman and Rep. McKay)). However, as acknowledged in that history, agencies are not legally bound to follow directives expressed in Committee reports or other legislative history, where those expressions are not explicitly carried over into the statutory language of a lump-sum appropriation. Matter of LTV, 55 Comp. Gen. 307, 321 (1975); cf., TVA v. Hill, 46 U.S.L.W. 4673, 4683 (June 15, 1978). While legislative history is important, the language of the conference report does not have the force of law. A degree of flexibility is desirable in carrying out dictates of legislation and the operation of the departments and agencies. If Congress desired to have the ultimate approval of funds expended for Panama Canal purposes under the Military Construction Authorization Act, it could have used language in the legislation which would require such approval. 55 Comp. Gen. 812, 820 (1976).

In conclusion, section 817 of the DOD Appropriation Authorization Act, 1979, supra, does not prohibit the current expenditures by the Army for the realignment of military bases in the Canal Zone. These funds have been authorized and appropriated through the DOD Military Construction Authorization and Appropriation Acts in which no such prohibitory language exists. Also, all statutory notice requirements have apparently been met by the Army before these funds were expended.

Your November 17 letter also argues that the Brooke reservation to the Panama Canal Treaty would prohibit the use of any United States funds and expenditures for implementation or pre-implementation purposes, at least until March 31, 1979, in the absence of a congressional enactment to the contrary. The Brooke reservation to the Panama Canal Treaty is as follows:

> "Exchange of the instruments of ratification of the Panama Canal Treaty and of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal shall not be effective earlier than March 31, 1979, and such Treaties shall not enter into force prior to October 1, 1979, unless legislation necessary to implement the provisions of the Panama Canal Treaty shall have been enacted by the Congress of the United States of America before March 31, 1979."

From our review of the limited legislative history of the Brooke amendment to the Treaty, we conclude that its primary purpose was to delay the effective date of the Panama Canal Treaties, to provide more

time to study and debate the provisions of whatever implementing legislation might be necessary. We see no evidence that the amendment was intended to prohibit the use of United States funds otherwise available for expenditure without further legislation, even though the activity supported is related to or is in anticipation of a later effective date of the Treaty. As originally drawn, the Treaty was to become effective 6 months after exchange of the instruments of ratification (Art. II). The Brooke reservation first delays the effective date of the exchange of instruments of ratification until at least March 31, 1979. Second, the Brooke reservation allows the Treaties to enter into force no sooner than October 1, 1979, unless implementing legislation has been enacted before March 31, 1979. As Senator Brooke stated when he introduced the amended version of his reservation:

> "The effect of the reservation is to provide Congress a maximum period of approximately 1-1/2 years to enact the necessary legislation. This should be sufficient time to do the proper job on a very complex piece of legislation. Moreover, it would provide us with an opportunity to monitor the drift of events in Panama and elsewhere that would have an impact on U. S. capacity to manage the canal over the next 20 years or so. Given the emotions that have been evoked by this issue, I see great merit in not feeling forced to proceed immediately with the implementing legislation if the decision is made to ratify the Panama Canal Treaty."
>
> * * * * *
>
> "There is an additional important reason why sufficient time should be allowed to pass the implementing legislation. If the treaty came into effect before the United States has passed the legislation, we would find ourselves in the rather untenable position of being bound by a legitimate international obligation but unable to carry out our responsibilities under it. Such a situation would, at a minimum, be damaging to our international image." 124 Cong. Rec. S 5637 (daily ed., April 17, 1978).

There is no mention in the debates on this reservation that it would prohibit Federal expenditures of funds in the Panama Canal Zone. See id., S 5637-5640. As the floor manager of the Treaty stated, in commenting on the reservation:

"The proposal which the Senator from Massachusetts is now offering places the maximum impetus for arriving at the implementing legislation without making the treaty action an empty one or a hoax on the other party [Republic of Panama]. He has calculated a timespan which I think is reasonable under the circumstances. It in effect embraces the balance of this Congress and, if we are really not able in that period of time to finally enact the implementing legislation, it gives us an opportunity at the beginning of the next Congress to have almost 3 months in which to enact the implementing legislation." Id., S 5639.

The Brooke reservation serves only to assure that the Treaty does not go into effect before October 1, 1979, unless implementing legislation is passed before March 31, 1979. As Senator Brooke stated during the debate on his reservation:

"Failure of the United States to be in a position to implement its part of the agreement immediately when the treaty would go into effect would create a very difficult problem and greatly complicate the effort to manage the canal until the end of the century." Id., at S 5637.

While the Army is presumably acting in terms of its assessment of requirements in light of the Treaty provisions, we find nothing in the Brooke reservation which purports to restrict the use of appropriated funds for operations consistent with the purposes of those appropriations. This is so irrespective of whether or not the activities involved are characterized as implementation of the treaty. As stated above, the only statutory restriction is in the DOD Appropriation Authorization Act, 1979. Funds appropriated for military construction are not subject to the restriction and section 402 funds are clearly available for the purposes in question.

Moreover, an interpretation that the Brooke reservation would prohibit the use of any United States funds for the purposes in question would be inconsistent with Congress' actions in enacting section 817 of the 1979 DOD Appropriation Authorization Act, supra, and with the statements contained in H. Rep. No. 95-1495, supra. In those instances, Congress assumed that some actions might be taken by DOD in connection with realignment of its forces in Panama as a result of the Treaty, and limited the expenditure of funds for this purpose, as previously discussed.

Obviously, such a limitation in that Act would be unnecessary if the Congress believed that the Brooke amendment already prohibited such expenditures.

Similarly, the Conference Report requirement for prior reprogramming approval of emergency construction expenditures in the Panama Canal Zone would also be unnecessary if no such expenditures could be made for the balance of the fiscal year, pursuant to the Brooke amendment.

We therefore find no basis in its language or history to conclude that the Brooke reservation prohibits the use of the Army's emergency construction funds under the Military Construction Authorization Act or any other Act for authorized purposes.

The executive branch, in proceeding under the above authority, however, should recognize that the authority so granted could be modified or repealed in the implementing legislation contemplated by the Brooke reservation. Such action would not be inconsistent with the stated purposes of the reservation, that is, to permit Congress an opportunity to apply, through the implementing legislation, such conditions as might be desired in the light of further considerations that may be involved in implementing the treaty. The agencies concerned, therefore, are proceeding subject to this risk.

We trust that the foregoing will be helpful.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States