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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Matter of: Department of Defense—Transfer and Use of Defense Emergency Response Funds

File: B-303145

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DIGEST

1. Generally, agencies are prohibited from transferring funds absent specific statutory authority. 31 U.S.C. § 1532. The Emergency Supplemental Act, 2002, Pub. L. No. 107-117, div. B, ch. 3, 115 Stat. 2299 (Jan. 10, 2002), and the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820, 836 (Aug. 2, 2002), provided the Secretary of Defense the legal authority to transfer funds from the Defense Emergency Response Fund to other Department of Defense (DOD) appropriations.

2. Transferred funds are available only for the purposes for which they are appropriated, unless otherwise provided by law. Funds transferred from the Defense Emergency Response Fund (DERF) to other DOD appropriations, however, were available for the purposes of the transferee appropriations because of the clear language in the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States. It provided that funds transferred from DERF shall be merged with and be available for the same purposes as the appropriation to which transferred. Pub. L. No. 107-206, 116 Stat. 820, 836 (Aug. 2, 2002).

3. Based on the information DOD provided, DERF and other appropriation accounts charged were available for the 20 projects at issue as approved. As described in the DOD documents provided, the 20 projects were sufficiently general in nature as to reasonably fall within the scope of the appropriations charged. However, as described in the DOD documents provided, some projects funded with Operation and Maintenance appropriations contemplated tasks that possibly involved construction. Accordingly, we recommend that DOD review these tasks to determine whether any tasks associated with the 20 projects involved military construction for which the charged O&M appropriation was unavailable. If DOD so determines, it should adjust its appropriation accounts accordingly.

DECISION

We are issuing this decision under 31 U.S.C. §§ 712, 717, and 3526, in response to congressional interest in the Department of Defense's (DOD) April 21, 2004, testimony concerning its use of approximately \$178 million of appropriated funds for projects that DOD approved in connection with the global war on terrorism near the end of fiscal year 2002. Specifically, we address whether DOD's use of these appropriated funds for certain projects approved near the end of fiscal year 2002 was unauthorized because the projects supported the subsequent conflict in Iraq.

In this decision, we provide information from DOD documents about the relationship among the \$178 million cited in DOD's testimony, the related projects, and their funding sources, and address two legal questions. First, whether the transfer of funds from DOD's Defense Emergency Response Fund (DERF)¹ to regular DOD appropriation accounts was authorized? Second, whether the appropriations funding the projects, either directly or through transfers, were available for the purposes for which they were used?

As discussed below, some DOD records indicate that the \$178 million cited in DOD's 2004 testimony relates to an initial DOD approval late in fiscal year 2002 of funding requirements for 20 projects.² Other DOD records, however, indicate that the actual scope and funding source of some projects differed from those identified in the initial approval documentation and the amount of funding for them increased or decreased. Accordingly, the \$178 million does not precisely reflect the funds that were actually made available for the projects or the amounts actually obligated or expended on them.

Of the 20 projects, DOD records indicate that 7 projects were funded with funds directly appropriated to various regular DOD appropriation accounts, although DOD records indicate that funds had been allocated from DERF for 3 of these 7 projects when DOD initially approved the projects. According to records DOD provided us, DERF funds were made available for 13 projects.³ DOD directly cited DERF as the funding source for 4 of the 13 projects and has characterized its funding actions for

¹ DERF was a distinct account to support DOD's efforts to respond to, or protect against, acts or threatened acts of terrorism. It received appropriations made directly to it and transfers from appropriations made to the President.

² DOD classified some of the records it provided us. Accordingly, we refer to the projects only at a high level of generality throughout this decision.

³ One project received the vast majority of its funds from a regular DOD appropriation account and an insignificant amount from DERF. We categorize this project for ease of presentation as having been funded from a regular DOD appropriation. See *infra* note 17.

these projects as a release but not a transfer of DERF funds. For some of the four projects, obligations were initially charged against regular DOD appropriation accounts and adjustments were later made to use DERF to reimburse the appropriation account previously charged. For 9 of the 13 projects, DOD transferred DERF funds to the Operations and Maintenance (O&M) appropriation accounts for the Department of the Army or the Department of the Air Force and as the projects progressed, obligations for the projects were charged directly to the applicable O&M account.

Regarding the first legal issue, the general rule is that appropriations may be transferred between appropriation accounts only to the extent authorized by law. As mentioned above, for some projects in which DOD directly cited DERF as the project's funding source, DOD documents also characterize DERF as reimbursing another DOD appropriation account previously charged with funding the project. The first appropriations act that directly appropriated funds to DERF explicitly authorized DERF to reimburse other DOD accounts for costs incurred after September 11, 2001, for certain purposes, including providing support to counter international terrorism and supporting national security. Regarding the DERF funds transferred to Army and Air Force O&M accounts for nine projects, the second appropriations act that directly appropriated funds to DERF explicitly authorized the transfers. The appropriations act did not require congressional notification before the Secretary of Defense transferred DERF funds, but the conference report for the act contained such a directive. The Under Secretary of Defense sent a timely notification to the chair and ranking members of various congressional committees.

Regarding the second legal issue, DOD's position is that the \$178 million was approved for projects that could have been used for other than the conflict in Iraq. Based on our review of the information DOD provided about the projects, and the related tasks performed and materials and services acquired, the 20 projects appear to have involved facilities, equipment, and services that were sufficiently general in nature to reasonably fall within the broad scope of the various appropriations charged. Accordingly, DOD's position is not unreasonable and the nexus some of the projects had to the eventual conflict in Iraq does not cause them to fall outside the scope of the appropriations charged. However, as described in the DOD documents provided, some projects funded with O&M appropriations contemplated tasks that possibly involved construction. To the extent O&M appropriations funded construction tasks whose funding would be limited to construction appropriation accounts, the O&M appropriations were not available for those tasks. The information DOD provided was not complete or detailed enough for us to definitively resolve this matter.⁴ Accordingly, we recommend that DOD review these tasks to

⁴ We were unable to determine if the actual amounts charged for all the projects were proper because the documentation necessary to do so was not available to us. We requested DOD to provide us with copies of documentation to support all project (continued...)

determine whether any tasks associated with the 20 projects involved military construction for which O&M appropriations were unavailable. To the extent DOD so determines, it should adjust its appropriation accounts accordingly.⁵

BACKGROUND

On April 21, 2004, the Committee on Armed Services of the United States House of Representatives conducted a public hearing on Iraq's transition to sovereignty.⁶ During the hearing, committee members asked one of the witnesses, then Deputy Secretary of Defense Paul Wolfowitz, about a public report that \$750 million was spent for the conflict in Iraq before Congress had passed a war powers resolution⁷ and that the \$750 million had been drawn from various accounts without proper communication with Congress.⁸ The Deputy Secretary acknowledged that in considering what tasks to fund from appropriations for the response to the September 11, 2001, terrorist attacks on the United States, DOD initially considered some tasks that could be viewed as specifically for Iraq before enactment of the Iraq resolution. The Deputy Secretary further testified, however, that DOD scrubbed out

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obligations. DOD, however, told us that it was unable to obtain all the obligation documents and that it was unlikely that the documents existed or could be retrieved. DOD also pointed to the difficulty in retrieving documents from a theater of war. Meeting attended by Susan A. Poling, Managing Associate General Counsel, U.S. Government Accountability Office (GAO); Thomas H. Armstrong, Assistant General Counsel, GAO; F. Abe Dymond, Assistant General Counsel, GAO; E. Scott Castle, Deputy General Counsel (Ethics and Fiscal), DOD; and Roger Pitkin, Senior Attorney Adviser (Fiscal), DOD (Jan. 13, 2005).

⁵ This recommendation is made pursuant to 31 U.S.C. § 720. Accordingly, DOD should report to the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Government Reform, and the Senate and House Committees on Appropriations on actions taken in response to this recommendation.

⁶ *Hearing on Iraq's Transition to Sovereignty: Hearing before the House Committee on Armed Services*, 108th Cong., 2d Sess. (Apr. 21, 2004), *hearing transcript available at* http://commdocs.house.gov/committees/security/has112000.000/has112000_0htm (last visited Sept. 14, 2005).

⁷ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (Oct. 16, 2002).

⁸ *Hearing on Iraq's Transition to Sovereignty*, at 67 (statement by Rep. Spratt); at 118 (statement by Rep. Meehan).

all tasks specifically for Iraq, leaving \$178 million for the “global war on terrorism, general application” and tasks that were “designed to strengthen [DOD’s] capabilities in the region or to support ongoing operations.”⁹

After the hearing, congressional interest continued in the tasks Deputy Secretary Wolfowitz referred to in his testimony, whether DOD had transferred funds to execute the related projects and, if so, whether Congress had been consulted to the extent required by law. In light of the Deputy Secretary’s testimony, we limited our inquiry to the \$178 million made available for the associated projects.

In addition to providing information about the relationship among the \$178 million cited in DOD’s testimony, the related projects, and their funding sources, our objective was to address two legal questions. First, whether the transfer of funds from DERF to other DOD appropriation accounts was authorized? Second, whether the appropriations funding the projects, either directly or through transfers, were available for the purposes for which they were used?

DISCUSSION

Appropriations Acts

The Deputy Secretary’s testimony generally refers to funds Congress appropriated in 2001 and 2002 to finance the response to the September 11, 2001, terrorist attacks on the United States. The testimony did not, however, identify the specific appropriation that supported the \$178 million that is the subject of this decision. The three appropriation acts enacted in 2001 and 2002 that funded the President’s Emergency Response Fund (ERF) and DOD’s Defense Emergency Response Fund (DERF) are summarized below.

After the terrorist attacks of September 11, 2001, the Congress established a \$40 billion ERF to deal with the attacks’ consequences. 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220 (Sept. 18, 2001) (2001 Emergency Supplemental). The 2001 Emergency Supplemental appropriated these

⁹ *Hearing on Iraq’s Transition to Sovereignty*, at 67-68 (statement by Deputy Secretary Wolfowitz). *See also* the statement by Deputy Secretary Wolfowitz: “[the \$178 million was for things that] had application to Iraq if we did Iraq, but they were needed elsewhere. What we took off of that list were those things that were exclusively Iraq preparatory.” *Id.* at 118. Mr. Wolfowitz also testified that after the October approval of the Iraq resolution, funds were soon made available to support Iraq preparatory tasks, including many of those that had been previously identified but scrubbed. *Id.* at 68.

funds to the President and made ERF available for the costs of “providing support to counter, investigate, or prosecute domestic or international terrorism,” and “supporting national security,” among other things. *Id.*

The Congress gave considerable flexibility to the President by making the \$40 billion available until expended and authorizing the President to transfer the funds to any authorized federal government activity. *Id.* The 2001 Emergency Supplemental, however, also provided differing types of congressional involvement in the availability and use of different portions of the \$40 billion appropriated. It required the President to consult with the chairmen and ranking minority members of the Committees on Appropriations before transferring any funds. The 2001 Emergency Supplemental did not establish any other administrative or legislative requirements in connection with the Presidential transfer of the first \$10 billion of the \$40 billion appropriated to ERF.

The 2001 Emergency Supplemental provided for additional congressional involvement in the President’s use of \$30 billion of the \$40 billion appropriated to ERF. It provided that \$10 billion was not available for transfer to any agency until 15 days after the Director of the Office of Management and Budget (OMB) had submitted to the Appropriations Committees a proposed allocation and plan for the agency’s use of the funds to be transferred. *Id.* Regarding the remaining \$20 billion, those funds could be obligated only when enacted in a subsequent emergency appropriations bill. *Id.*, 115 Stat. 221. The 2001 Emergency Supplemental also required the President to send an amended budget request proposing an allocation of funds and OMB to report quarterly on the use of the funds to the Appropriations Committees. *Id.*

DERF was a distinct account to support DOD’s efforts to respond to, or protect against, acts or threatened acts of terrorism. Of the \$40 billion the 2001 Emergency Supplemental appropriated to ERF, approximately \$15 billion was transferred to DERF.¹⁰ The vast majority of the \$15 billion was administratively transferred pursuant to the President’s authority to transfer provided by the 2001 Emergency Supplemental. The Presidential transfers from ERF to DERF occurred in a series of transfers totaling \$20 billion beginning September 21, 2001, involving accounts throughout government.¹¹ In addition to ERF funds administratively transferred,

¹⁰ GAO, *Defense Budget: Tracking of Emergency Response Funds for the War on Terrorism*, GAO-03-346 (Washington, D.C.: April 30, 2003).

¹¹ Letter from the President to the Speaker of the House, Sept. 21, 2001 (transmitting initial transfers of \$5.1 billion from ERF to other appropriation accounts). *See also, e.g.*, Letter from the President to the Speaker of the House, Nov. 9, 2001 (transmitting transfers of \$9.3 billion from ERF to other appropriation accounts). These and similar letters, together with enclosures from the Director of OMB, were in furtherance of the congressional notification requirements in the 2001 Emergency

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almost \$3.4 billion was statutorily transferred from ERF to DERF. Specifically, of the \$20 billion that the 2001 Emergency Supplemental appropriated to ERF but limited its availability for obligation to the enactment of subsequent emergency appropriations, the Emergency Supplemental Act, 2002, transferred \$3.396 billion from ERF to DERF for such purposes as increased situational awareness, increased worldwide posture and offensive counterterrorism.¹²

Section 301 of the Emergency Supplemental Act, 2002, also contained general provisions applicable to DERF funds. Relevant to the matters before us, section 301 provides that the amounts in DERF are available for the purposes set forth in the 2001 Emergency Supplemental, which, as stated above, included such purposes as providing support to counter, investigate, or prosecute domestic or international terrorism, and supporting national security. Pub. L. No. 107-38, 115 Stat. 2299. Section 301 also made DERF available to reimburse other DOD appropriations for costs incurred on or after September 11, 2001, for the purposes set forth in the 2001 Emergency Supplemental. *Id.* Section 301 also authorized the Secretary of Defense to transfer funds from DERF to any defense appropriation account, in which case the transferred funds would be merged with and available for the same purposes as the transferee appropriation. *Id.*, 115 Stat. 2300. Finally, section 301 required the Secretary of Defense to quarterly “provide to the Congress a report (in unclassified and classified form, as needed) specifying the projects and accounts to which funds provided in the [Emergency Supplemental Act, 2002, to DERF] are to be transferred.” *Id.*

The documents DOD provided use the term “DERF-1” to describe funds initially appropriated to ERF by the 2001 Emergency Supplemental and later made available to DERF. The documents do not distinguish between ERF funds that the President transferred to DERF as authorized by the 2001 Emergency Supplemental and the \$3.396 billion that the Emergency Supplemental Act, 2002, transferred from ERF to DERF.

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Supplemental regarding Presidential transfers from ERF to other appropriation accounts of the first \$20 billion that the 2001 Emergency Supplemental appropriated.

¹² Department of Defense and Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorists Attacks on the United States, 2002, Pub. L. No. 107-117, div. B, ch. 3, 115 Stat. 2230, 2299 (Jan. 10, 2002). As provided by the 2001 Emergency Supplemental, this act made the second \$20 billion that the 2001 Emergency Supplemental had appropriated available for obligation in response to the President’s submission of an emergency request. Letter from the President to the Speaker of the House, Oct. 17, 2001 (transmitting emergency funding requests totaling \$20 billion).

In addition to the approximately \$15 billion DERF received from transfers from ERF, DERF also received direct appropriations in fiscal year 2002. Specifically, the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorists Attacks on the United States (2002 Supplemental) appropriated \$11.9 billion to DERF, which would remain available through fiscal year 2003.¹³ Congress appropriated these funds as a lump sum to DERF as requested by the President with the expectation that they would be transferred to DOD's regular appropriation accounts for execution.¹⁴ The documents DOD provided use the term "DERF-2" to refer to the funds the 2002 Supplemental directly appropriated to DERF.

Projects and Their Funding Sources

We did not conduct an audit or investigation of the funds cited in the Deputy Secretary's April 21, 2004, testimony or the projects they financed. Rather, to address the two legal questions presented above, we sent two development letters to DOD seeking information and supporting documents on its use of the \$178 million cited in the testimony.¹⁵ In response to our inquiry, DOD identified 20 projects relating to the \$178 million cited in the testimony and provided documents containing summary and detailed project and funding information for the projects. However, the completeness of the information provided varied significantly by project. We concluded our factual inquiry when DOD informed us that it was unable to provide us with all the project obligating documents we requested.¹⁶

Of the 20 projects DOD identified as related to the \$178 million, DOD documents indicate that regular DOD appropriation accounts were directly charged for seven projects. For six of the seven projects, the following appropriations were charged without utilizing what DOD characterized as DERF-1 or DERF-2 funds: fiscal year 2002 O&M, Air Force (three projects); fiscal year 2003 O&M, Marine Corps; fiscal years 2001/2002 and 2002/2003 Overseas Humanitarian, Disaster and Civic Aid; and fiscal year 2002 O&M, Defense-wide. The seventh project was directly charged primarily to fiscal year 2002, Other Procurement, Army, although about \$400,000 was allocated from DERF-2. DOD's summary response to our inquiry shows an initial

¹³ Pub. L. No. 107-206, 116 Stat. 820, 836 (Aug. 2, 2002). Of the \$11.9 billion appropriated, only \$11.3 billion was placed in DERF because \$602 million would be available to DERF only after the President designated that amount as an emergency requirement in a new budget request. 116 Stat. 837. *See also* GAO-03-346 at 18.

¹⁴ H.R. Rep. No. 107-480, at 14 (May 20, 2002); S. Rep. No. 107-156, at 40-41 (May 29, 2002).

¹⁵ Letters from Susan A. Poling, Managing Associate General Counsel, GAO, to William J. Haynes, General Counsel, DOD, June 1, 2004, and Sept. 14, 2004.

¹⁶ *Supra* note 4.

approval amount for these seven projects of almost \$27 million of the \$178 million. As previously mentioned, the \$178 million is an initial approval amount and the project specific documentation DOD provided us shows that the funding for some of these projects changed substantially. For example, for the project involving the Overseas Humanitarian, Disaster and Civic Aid appropriations, DOD's initial approval amount was \$11.5 million but the amount obligated was \$5.8 million. For one of the projects involving the fiscal year 2002 O&M, Air Force appropriation, the initial approval amount was \$2.1 million but the scope of the project changed significantly and its total cost was only about \$624,000.

For four projects, DOD approved and charged DERF-1 funds. As previously discussed, DOD used DERF-1 to describe funds initially appropriated to ERF by the 2001 Emergency Supplemental and later made available to DERF. DOD initially identified regular DOD appropriations for these projects. Documents DOD provided us show that funding for these projects was changed from the regular DOD appropriation to DERF-1 either by directly charging DERF-1 or by using DERF-1 to reimburse the regular appropriation charged. Either of these approaches to using what DOD characterizes as DERF-1 was authorized by the Emergency Supplemental Act, 2002.

DOD's summary response to our inquiry shows an initial approval amount for these four projects of over \$43 million of the \$178 million. However, as with some of the seven projects directly charged to regular DOD appropriations, the project specific documentation DOD provided us shows that the source and amount of funding for some of the four projects ultimately charged to DERF-1 changed substantially. For example, DOD's summary response to our inquiry shows that the initially approved funding for 1 project was \$6.96 million -- about \$6.4 million from Air Force Procurement and \$600,000 from Army O&M. The contract for this project was initially supported with the Air Force funding. The contract was subsequently amended to shift the funding from Air Force to Army. Ultimately, a Military Interdepartmental Purchase Request changed the funding source to DERF-1 for almost \$5 million.

Finally, of the 20 projects and \$178 million that are the subject of this decision, DOD approved and used DERF-2 funding for nine projects.¹⁷ The amount of DERF-2 funding initially approved for these nine projects was over \$108 million. Unlike DERF-1 funding in which either obligations were directly charged to DERF or DERF was used to reimburse regular DOD appropriations previously charged with obligations, DERF-2 represents funds transferred to and merged with regular DOD

¹⁷ We included a project approved with about \$8 million of Army Procurement funds and \$400,000 of DERF-2 funds in the previous discussion of the seven projects charged directly to regular DOD appropriations. Accordingly, we do not include that project or its funding here for ease of presentation.

appropriation accounts. Seven of the nine projects were financed with DERF-2 funds that DOD transferred to fiscal year 2002 Army O&M. The other two projects were financed with DERF-2 funds that DOD transferred to fiscal year 2002 Air Force O&M. The transfers are discussed below.

Transfer of DERF-2 Funds

The transferred DERF-2 funds that DOD attributed to the nine projects identified in response to our inquiry were a small part of much larger transfers DOD executed at the end of fiscal year 2002. The 2002 Supplemental appropriated \$11.9 billion to DERF. Of this amount, DOD transferred \$526 million to the fiscal year 2002 Army O&M appropriation. Memorandum for Assistant Secretary of the Army (Financial Management and Comptroller) from John M. Evans, Director for Operations and Personnel, Office of the Under Secretary of Defense (Sept. 6, 2002). DOD also transferred \$543 million to the fiscal year 2002 Air Force O&M appropriation. Memorandum for Assistant Secretary of the Air Force (Financial Management and Comptroller) from John M. Evans, Director for Operations and Personnel, Office of the Under Secretary of Defense (Sept. 6, 2002).

Of the \$526 million transferred to the fiscal year 2002 O&M, Army appropriation, over \$88 million was initially approved for seven of the projects identified in response to our inquiry. Of the \$543 million transferred to the fiscal year 2002 Air Force O&M appropriation, \$20 million was initially approved for 2 of the DOD-identified projects.¹⁸

These transfers were authorized. A transfer is defined as the shifting of funds between appropriations.¹⁹ Agencies are prohibited from transferring funds unless they have statutory authority to do so. 31 U.S.C. § 1532. In making appropriations to DERF, Congress explicitly provided DOD with statutory authority to transfer those funds to regular DOD appropriation accounts. Specifically, the appropriation to DERF provided that “the Secretary of Defense may transfer the funds provided herein only to appropriations for military personnel; operation and maintenance; procurement; research, development, test and evaluation” Pub. L. No. 107-206, 116 Stat. at 836.

¹⁸ Documentation linking specific transferred funds to these projects is not available. DOD does not, nor is it required to, account for such linkage.

¹⁹ GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 95.

Thus, the language of the 2002 Supplemental is clear on its face.²⁰ The 2002 Supplemental authorized the Secretary to transfer funds appropriated to DERF to O&M, Army, O&M, Air Force, and other regular appropriations identified in the statute.

Further, the 2002 Supplemental does not require the Secretary to notify Congress before transferring DERF funds. The conference report on the 2002 Supplemental, however, does contain the following notification directive:

“the conferees agree . . . with the Senate’s directive that the Department of Defense notify the Committees on Appropriations prior to transferring DERF funds to appropriations accounts.”

H.R. Conf. Rep. No. 107-593, at 130 (2002). The Department followed this directive.²¹

Availability of Funds as to Purpose

The basic rule is that appropriated funds are available only for the purposes for which they are appropriated. 31 U.S.C. § 1301(a). Agencies, however, have reasonable discretion in determining how to carry out the objects of an appropriation. “It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object.” 6 Comp. Gen. 619, 621 (1927). In applying this concept, commonly known as the “necessary expense doctrine,” we consider whether the expenditure is reasonably related to the purposes that Congress intended the appropriation to fulfill.²² Thus, to assess whether DOD had funds available for the 20 projects, we

²⁰ See also H.R. Rep. No. 107-480, at 14 (2002) (“As requested by the President, the Committee has provided the majority of funding for Defense Department activities in the Defense Emergency Response Fund. The Committee directs the Department of Defense to transfer funds appropriated in the DERF to the Department’s normal appropriations accounts for execution”)

²¹ See, e.g., letters from Dov S. Zakheim, Under Secretary of Defense, to Robert Byrd, Chairman, Senate Committee on Appropriations, Bill Young, Chairman, House of Representatives Committee on Appropriations, Daniel K. Inouye, Chairman, Senate Appropriations Subcommittee on Defense, Jerry Lewis, Chairman, House of Representatives Appropriations Subcommittee on Defense, Aug. 28, 2002.

²² E.g., B-303170, Apr. 22, 2005; 63 Comp. Gen. 422, 427–428 (1984). The other two prongs of the necessary expense doctrine’s three-part test are that the expenditure must not be prohibited by law and that the expenditure must not be otherwise

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must consider the authorized purposes of the appropriations that provided the funding.

Preliminary Issue

As a preliminary matter, we must properly frame the issue. In our opinion, the issue is not whether given the relationship between the projects and the conflict in Iraq, the appropriations DOD charged for these projects were available for the Iraq conflict prior to the October 16, 2002, war powers resolution. As explained below, this formulation of the issue assumes a direct and exclusive relationship between the projects and the Iraq conflict that the record before us does not support.

The Department does not dispute that the projects had utility for the conflict in Iraq. Rather, DOD asserts that it delayed any projects that appeared to be exclusive to Iraq and the \$178 million it approved late in fiscal year 2002 was for projects that had general application. Specifically, Deputy Secretary Wolfowitz testified that the \$178 million was approved for projects “that had application to Iraq if we did Iraq but they were needed elsewhere.”²³ The Deputy Secretary similarly testified that the \$178 million was for the “global war on terrorism, general application” and tasks that were “designed to strengthen [DOD’s] capabilities in the region or to support ongoing operations.”²⁴

The more recent DOD response to our inquiry is consistent with the Deputy Secretary’s testimony. We met with DOD officials who asserted that the projects supported the global war on terrorism. Since the funds were available for the general purpose of supporting the global war on terrorism, the funds were used for the purposes for which they were available. Meeting attended by Susan A. Poling, Managing Associate General Counsel, GAO; Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO; F. Abe Dymond, Assistant General Counsel, GAO; E. Scott Castle, Deputy General Counsel (Ethics and Fiscal), DOD; and Roger Pitkin, Senior Attorney Adviser (Fiscal), DOD (Jan. 13, 2005).

Based on our review of the project information DOD provided, DOD’s position is not unreasonable. Certainly the title or summary description of some projects approved late in fiscal year 2002 suggests a close nexus to the subsequent conflict in Iraq. However, we did not identify specific tasks that were performed, or goods or services that were acquired, before the October 16, 2002, war powers resolution that

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provided for. *Id.* The latter prong may be implicated here, as reflected in the discussion below under the heading Military Construction Issue.

²³ *Hearing on Iraq’s Transition to Sovereignty*, at 118.

²⁴ *Hearing on Iraq’s Transition to Sovereignty*, at 67–68.

DOD could have utilized only for the Iraq conflict. In any event, the fact that there ultimately was a conflict in Iraq and these projects furthered DOD's effort in that conflict does not drive our analysis of whether the appropriations used for the 20 projects were available for those purposes.

Direct Charge to Regular DOD Appropriations

We turn next to the appropriations that funded the 20 projects. As discussed above, the \$178 million approved for 20 projects came from three categories of DOD funding. The first category comprises regular DOD appropriation accounts, which were directly charged for 7 projects. For this category, we must of course look to the purposes associated with the each of the appropriations charged.

For 5 of the 7 projects, the regular DOD appropriations accounts directly charged were fiscal year 2002 O&M appropriations for DOD or one of the military services. These projects generally involved preparing and upgrading facilities and equipment. O&M appropriations are generally understood to be available for the purpose of funding an agency's day-to-day operations and providing for the maintenance of its equipment and facilities.²⁵ This general understanding is reflected in the reports of the House of Representatives and the Senate Appropriations Committees on the Department of Defense Appropriation Act, 2002.²⁶ With respect to the military in fiscal year 2002, O&M funds are available for operating and maintaining the Armed Forces, including related DOD support activities. H.R. Rep. No. 107-298, at 41 (2001). O&M funds provide the resources required to prepare and conduct combat operations and other peace time missions. S. Rep. No. 107-109 at 28 (2001). They are also available to pay for services for maintenance and repairs of equipment and facilities, the purchase of fuel, supplies and spare parts for weapons and equipment. *Id.*

For the sixth and seventh projects, DOD used accounts other than fiscal year 2002 O&M accounts. The sixth project consisted of purchasing humanitarian rations to feed civilians in the Central Command's area of responsibility. DOD funded this project from the fiscal year 2002/2003 Overseas Humanitarian, Disaster, and Civic Aid appropriation, which was available "[f]or expenses relating to the Overseas Humanitarian, Disaster, and Civic Aid programs of the Department of Defense." Pub. L. No. 107-117, 115 Stat. at 2237. The seventh project involved the purchase of

²⁵ See, e.g., B-303170, Apr. 22, 2005: *Justification of Operation and Maintenance, Army Estimates for Fiscal Year 2002*, at 1.

²⁶ Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, div. A, 115 Stat. 2230 (Jan. 10, 2002).

satellite antennas and other satellite communications equipment. It was funded from the fiscal year 2002 Other Procurement, Army, appropriation, which was available for such purposes as “communications and electronic equipment.” Pub. L. No. 107-117, 115 Stat. at 2239.

The activities associated with the 7 projects that were funded by the appropriations described above involved property, equipment, and related services that appear to be of the type that DOD could reasonably acquire or perform as part of its normal use of those appropriations. Accordingly, the goods and services associated with these 7 projects appear to fall within the scope of the appropriations used to fund them.

DERF-1 Funds

The second category of DOD funding comprises four projects charged to what DOD characterizes as DERF-1. For this category, we look not only to the purposes of the Emergency Supplemental Act, 2002, but also to the 2001 Emergency Supplemental. The Emergency Supplemental Act, 2002, transferred almost \$3.4 billion from ERF to DERF and made specific amounts available for specific purposes, such as \$850 million for situational awareness, \$1.495 billion for increased worldwide posture, and \$372 million for offensive counterterrorism. Pub. L. No. 107-117, 115 Stat. 2299. DERF also received almost \$12 billion from ERF in Presidential transfers authorized by the 2001 Emergency Supplemental. Section 301 of the Emergency Supplemental Act, 2002, makes clear that DERF is available for the purposes set forth in the 2001 Emergency Supplemental. *Id.* These purposes included providing support to counter, investigate, or prosecute domestic or international terrorism, and supporting national security. Pub. L. 107-38, 115 Stat. 220. Because DOD did not distinguish between the DERF funds the President transferred, which would be available for the broad purposes set forth in the 2001 Emergency Supplemental, and the DERF funds the Congress legislatively transferred, which would be available in the amounts and for the purposes Congress legislated in the Emergency Supplemental Act, 2002, we consider the four projects supported by DERF-1 funding in the context of the purposes of both statutes.

The four DERF-1 projects involved expanding and upgrading facilities, upgrading and modifying communications equipment, and obtaining communications services. The 2001 Emergency Supplemental is available for such purposes as providing support to counter, investigate or prosecute domestic or international terrorism and supporting national security, and the Emergency Supplemental Act, 2002, is available for such purposes as increased situational awareness, increased worldwide posture and offensive counterterrorism. The four projects are not by their nature inconsistent with the broad purposes of either of these Acts. Accordingly, the goods and services associated with these four projects appear to fall within the scope of the appropriations used to fund them.

DERF-2 Funds

The third category comprising the nine projects funded by the 2002 Supplemental, which DOD characterizes as DERF-2 funds, presents an issue that does not arise with the other two categories. The 2002 Supplemental appropriated almost \$12 billion to DERF and authorized the Secretary of Defense to transfer funds to certain regular DOD appropriation accounts. Pub. L. No. 107-206, 116 Stat. at 836. The general rule is that transferred funds are available only for the purposes provided by the act appropriating the funds. 31 U.S.C. § 1532. Section 1532 recognizes, however, that Congress may provide otherwise by law.

The 2002 Supplemental is just such a law. In addition to authorizing funds to be transferred, the 2002 Supplemental provided that “. . . any funds transferred shall be merged with and shall be available for the same purposes and for the same time period as the appropriation to which transferred . . .” 116 Stat. 836.

Because this provision specifies that transferred funds shall be merged with the appropriation to which they are transferred, the funds DOD transferred from DERF to the appropriations used to fund 9 projects are available for the purposes of the appropriations to which they were transferred. Accordingly, we look to the purposes of those appropriations to determine whether the appropriations charged were available for the purposes of the objects identified.

The two appropriation accounts to which DOD transferred DERF funds for the nine projects were Army and Air Force O&M. The activities associated with the nine projects that were funded by the O&M appropriations included transporting and storing of ammunition, materials and rolling stock; installing and maintaining fuel pumps; establishing or improving facilities; buying satellite antennas; and leasing electric generators.

As previously discussed, O&M appropriations are available generally for funding day-to-day operations and providing for the maintenance of its equipment and facilities. The activities associated with the 9 projects funded by the O&M appropriations involved property, equipment, and related services that appear to be of the type that DOD could reasonably acquire or perform using those appropriations. Accordingly, the goods and services associated with these 7 projects appear to be sufficiently general in nature as to reasonably fall within the scope of the appropriations used to fund them.

Military Construction Issue

With respect to the projects funded with O&M appropriations, either directly or through the transfer of DERF-2 funds, an additional issue exists. While the goods and services associated with the projects appear to be sufficiently general in nature as to reasonably fall within the scope of the O&M appropriations, some of these

projects as described in the DOD documents provided to us appear to have contemplated tasks that possibly involved construction.

The military construction statutes limit DOD's use of O&M funds for each military construction project to \$750,000 (or a higher amount if unique conditions are met);²⁷ otherwise DOD must use its military construction appropriations. A military construction project includes "all military construction work ... necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility."²⁸ Under this statutory definition, military construction includes activities "with respect to a military installation."²⁹ Further, these statutes provide a broad definition of the term "military installation."³⁰

In response to our request to DOD to provide project documentation for any construction associated with these projects and to identify the legal authority to expend O&M funds for any such construction, DOD provided some limited project documentation and cited to a February 2003 memorandum from the Under Secretary of Defense (Comptroller)³¹ as reflective of DOD's legal authority. As explained to us in meetings with representatives of the DOD Office of General Counsel, this memorandum sets out criteria for the use of O&M funds consistent with DOD's longstanding legal view that O&M funds may be used for construction of a temporary

²⁷ 10 U.S.C. § 2805(c).

²⁸ 10 U.S.C. § 2801(b). *See, e.g.*, B-234326 (Dec. 24, 1991) (acquisition of 12 trailers is a single military construction project because the 12 trailers were "interrelated" and constituted a "complete and usable facility").

²⁹ 10 U.S.C. § 2801(a) (defining "military construction" to include "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements").

³⁰ 10 U.S.C. § 2801(c)(2) (defining "military installation" to mean "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control").

³¹ Memorandum from Dov S. Zakheim, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management and Comptroller), Assistant Secretary of the Navy (Financial Management and Comptroller), Assistant Secretary of the Air Force (Financial Management and Comptroller, Comptrollers, Defense Agencies, *Availability of Operations and Maintenance Appropriations for Construction*, Feb. 27, 2003.

nature in support of certain military operations.³² In DOD's view, such temporary construction in the specified operations is not subject to the funding limitations prescribed by the military construction statutes, 10 U.S.C. §§ 2801, 2802, 2805, 2811. DOD asserts that construction meeting the criteria set out in the memorandum is not subject to the military construction statutes because it is not of a "kind carried out with respect to a military installation" and therefore does not meet the definition of "military construction." In particular, DOD's view is that real property used by it on a temporary basis under the specified circumstances does not fall within the meaning of the term "military installation," regardless of the inherent permanency of the construction work. In our meeting with DOD officials, they informed us that, as of the time DOD approved these projects, DOD had no reasonable expectation of a long-term interest in the real property associated with the projects.

We have recognized that construction work of a temporary nature may be funded with DOD's O&M funds in "extremely limited" circumstances.³³ In particular, in applying the principles derived from our earlier cases interpreting a longstanding prohibition³⁴ on using appropriations to fund contracts for construction of "public improvements,"³⁵ we have held that the military construction statutes do not cover the types of work that are "clearly of a temporary nature" as addressed in those

³² Specifically, DOD states that it has been a long-standing practice to use O&M funds for construction if:

"(1) There is a properly documented determination that the construction is necessary to meet an urgent military operational requirement of a temporary nature, while U.S. Armed Forces are participating in armed conflict or contingency operations, as defined under 10 U.S.C. § 101(a)(13);

(2) The construction will not be carried out at a military installation, as defined under 10 U.S.C. § 2801, or at a location where the U.S. is reasonably expected to have a long-term interest or presence; and,

(3) The United States has no intention to use the construction after the operational requirement has been satisfied and the nature of the construction is the minimum necessary to meet the temporary operational need."

Id.

³³ 63 Comp. Gen. 422, 435 (1984).

³⁴ *Codified at* 42 U.S.C. § 12.

³⁵ *See* 42 Comp. Gen. 212, 214–15 (1962).

cases.³⁶ In reviewing the limited documentation provided by DOD, we were unable to determine whether the construction components of any of the projects were of such a temporary nature that the military construction statutes would not apply. Further, we have not addressed DOD's interpretation of the term "military installation" for purposes of the analysis in DOD's February 2003 memorandum. In any event, Congress responded unfavorably to DOD's February 2003 memorandum.³⁷ Also, Congress has enacted subsequent legislation that imposed controls over DOD's use of O&M funds for construction meeting the criteria set out in the memorandum."³⁸

To the extent O&M appropriations funded construction tasks whose funding would be limited to construction appropriation accounts, the O&M appropriations were not available for those tasks. Accordingly, we recommend that DOD review these tasks to determine whether any tasks associated with the 20 projects involved military construction for which the charged O&M appropriation was unavailable. If DOD so determines, it should adjust its appropriation accounts accordingly.

CONCLUSION

Regarding the first legal issue, the 2002 Supplemental that directly appropriated funds to DERF explicitly provided authority for their transfer to Army and Air Force O&M accounts for 10 projects. The 2002 Supplemental did not require congressional notification before the Secretary of Defense transferred DERF funds, but the conference report for the act contained such a directive. The Under Secretary of Defense sent a timely notification to the chair and ranking members of various congressional committees.

Regarding the second legal issue, based on the information DOD provided, DERF and other appropriation accounts charged were available for the 20 projects as approved. As described in the DOD documents provided, the 20 projects were sufficiently general in nature as to reasonably fall within the scope of the appropriations charged. However, as described in the DOD documents provided,

³⁶ 63 Comp. Gen. 422, 435 (1984).

³⁷ H.R. Conf. Rpt. No. 108-76, at 90 (Apr. 12, 2003) ("DOD argues that long-standing practice enables it to utilize [its] legal construct under certain circumstances despite its effect of vitiating and/or amending the underlying statute The conferees disagree with [DOD's] pronouncement, which effectively obviates the law and turns an alleged practice into de facto law.")

³⁸ See *Emergency Wartime Supplemental Appropriations Act, 2003*, Pub. L. No. 108-11, § 1901(d), 117 Stat. 559, 587 (Apr. 16, 2003); *Emergency Supplemental Appropriations Act for the Reconstruction of Iraq and Afghanistan, 2004*, Pub. L. No. 108-106, § 1302, 117 Stat. 1209, 1221 (Nov. 6, 2003).

some projects funded with O&M appropriations contemplated tasks that possibly involved construction. Accordingly, we recommend that DOD review these tasks to determine whether any tasks associated with the 20 projects involved military construction for which the charged O&M appropriation was unavailable. If DOD so determines, it should adjust its appropriation accounts accordingly.

/signed/
Anthony H. Gamboa
General Counsel