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Ares rocket maker says NASA created funding shortfall

Ares rocket manufacturer ATK claims NASA created the appearance of a \$1 billion shortfall in the nation's moon program by abruptly and radically changing agency accounting practices that date back to the 1970s.

Some on Congress, meanwhile, continue to say NASA and the Obama Administration are skirting legislation that prohibits the agency from termination or making changes to Project Constellation, which aims to return American astronauts to the moon.

"This is one more attempt by this Administration to terminate a program that Congress specifically directed them to continue," said U.S. Rep. Bill Posey, R-Rockledge. "This effort is not only directly contrary to congressional direction, but it is an affront to the hardworking NASA and contractor workforce. Clearly the Administration has mismanaged this program."

NASA this week informed Congress that it stop funding the Ares rocket project for the remainder of the year, defer work on the Orion spacecraft and, among other things, cut \$89 million from ground operations.

Saying NASA is bound by law to save money to cover President Obama's plan to cancel Constellation, NASA Administrator Charles Bolden said the agency intends to cut off \$1 billion that otherwise would be spent on the program by the end of the year.

Bolden claimed a 140-year-old federal spending law called the Anti-Deficiency Act forced the action. Enacted in 1870, the Anti-Deficiency Act says the federal government cannot spend money in excess of appropriations made by Congress. NASA officials say the law also requires contractors to set aside money to cover termination costs in case a government contract is cancelled.

Bolden told legislators the current estimate for "potential termination liability" for Constellation contracts is \$994 million. Once those estimates are accounted for, Bolden said, the Constellation program is facing a shortfall of \$991 million for the remainder of the year.

In a missive written in response to congressional inquiries, ATK noted that NASA since the mid-1970s has instructed the company not to set aside money to cover termination liabilities. Internal memos dating back to 1976 were forwarded to buttress that claim.

Based in Utah, the company makes shuttle solid rocket boosters and the first stage of the Ares I rocket. It stands to bear the brunt of the 2,500 of 5,000 jobs cuts NASA forecasts by the end of the year as a result of the accounting change.

"NASA has for several years deliberately taken the position that they will not fully cover a contractor for his costs and termination liabilities so that NASA may obtain maximum utilization of those funds appropriated by Congress," said R.E. Davis, chief executive officer of Thiokol Corp., which was subsequently acquired by Alliant Techsystems, also known as ATK.

A 1992 memo says NASA "deliberately underfunded the costs as a matter of common practice."

NASA this week decided to change its longstanding accounting practices and require contractors to set aside enough money to cover the cost of terminating Project Constellation, which the Obama Administration intends to do as part of its proposed 2011 budget.

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Brian Wagner, a legislative affairs official with ATK, said in a note to Congress that NASA "created this funding shortfall by changing its decades-long management practice with respect to termination liability."

Federal courts have held that the Anti-Deficiency Act in many cases does not require contractors to set aside money to cover potential termination costs, Wagner noted. In one case the court stated that "the government may not hide behind the Anti-Deficiency Act when there is a binding obligation to pay and the government has general appropriations sufficient to cover the contractual obligation," he said.

"If NASA had continued to operate for the remainder of FY2010 under the same practices it has used for decades, instead of suddenly and drastically changing their approach to termination liability with only 4 months remaining in the fiscal year, there would be no funding shortfall at all, and it would be completely compliant with Congressional direction. In fact there would be a \$3 million surplus by NASA's own estimates for the Constellation work planned in FY10," Wagner wrote.

NASA spokesman Bob Jacobs said the agency is reviewing ATK's response but believes it is taking the proper steps to maintain compliance with federal spending laws. "We took the action we believe is required by law," Jacobs said.

Project Constellation has strong backing from members of Congress in Florida, Texas, Alabama, Utah, California and other states where NASA operates satellite field centers.

And some legislators in those states claim NASA and the administration are trying to kill the program without congressional approval.

The House and Senate Committees on Appropriations reached an agreement last December on a bill that requires congressional approval of any changes to Project Constellation. The bill requires congressional approval of "any program termination or elimination or the creation of any new program, project or activity."

Posey said the accounting switch by NASA appears to be the latest step in what he believes is a concerted effort to circumvent the law and start scaling down the Constellation program.

"Given that the Congress has yet to act on the President's proposal and Constellation is the program of record," he said, "the Administration has an obligation to follow the law rather than find convenient excuses to change their practices to kill Constellation in the absence of Congressional consent."