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B-226389, Nov 14, 1988

Number: B-226389

Date: 1988-11-14

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APPROPRIATIONS/FINANCIAL MANAGEMENT - Budget Process - Conflicting statutes - Statutory interpretation DIGEST: Even though section 1201 of the National Defense Authorization Act for 1987 was enacted into law after section 9085 of the Department of Defense (DOD) Appropriations Act, 1987, section 1201 did not impliedly repeal section 9085. Facts and circumstances surrounding enactment of the two statutes, as well as section 1201(b)'s express repeal of provision of 1986 DOD Appropriation Act, identical to section 9085 do not indicate that Congress intended to repeal by implication section 9085. See cases cited.

The Honorable Duncan Hunter

House of Representatives

In separate requests you and Senator Wilson have asked about Navy's consideration of the foreseeable costs of moving Navy ships from their homeports to other locations for overhaul work. As agreed with your staffs, this letter addresses the question whether section 1201(a) of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3967 (November 14, 1986), requires the Secretary of the Navy, in the award of ship overhaul contracts, to consider the foreseeable costs of moving a vessel and its crew from the homeport to place of repair and back. The Navy advises us that contracts funded with fiscal year 1987 appropriations for the overhaul of naval vessels on the West Coast have been awarded without considering the foreseeable costs specified in section 1201(a). The Navy maintains that section 9085 of the Department of Defense Appropriations Act, 1987, Pub. L. No. 99-591, 100 Stat. 3341, 3341-115 (October 30, 1986), temporarily exempted West Coast ship overhaul contracts from the requirements of section 1201(a). explained in detail below, we agree.

Section 1201(a) amends section 7299a of title 10, United States Code, by adding a new subsection (c), which provides as follows:

"In evaluating bids or proposals for a contract for the overhaul, repair, or maintenance of naval vessel, the Secretary of the Navy shall, in determining the cost or price of work to be performed in an area outside the area of the homeport of the vessel, consider foreseeable costs of moving the vessel and its crew from the homeport to the outside areas and from the outside area back to the homeport at the conclusion of the contract."

In contrast, section 9085 of the DOD Appropriations Act, 1987, provides that:

"None of the funds available to the Department of the Navy may be used to enter into any contract for the overhaul, repair, or maintenance of any naval vessel on the West Coast of the United States which includes charges for interport differential as an evaluation factor for award." /1/

The Navy's Office of Legislative Affairs states that the Navy relies on section 9085 to support its award of fiscal year 1987 West Coast overhaul contracts that do not consider interport differential costs. Consequently, the question has been asked why the Navy does not follow the more recently enacted provision, section 1201(a). Section 1201(a) was enacted 2 weeks after section 9085.

In response to our inquiry, the Navy explains that the foreseeable costs referred to in section 1201(a) are identical to the interport differential referred to in section 9085. The Navy takes the position that the rules of statutory construction require that, if possible, these provisions be construed harmoniously. This can be done, according to the Navy, if section 9085 is viewed as a funding limitation on section 1201(a), the permanent legislation. The Navy further states:

"It is not uncommon for an Appropriation Act to impose funding limitations on permanent legislation ... The two Acts can be read together as a one year funding limitation on permanent legislation. Furthermore, the Authorization Act specifically repealed language in the 1986 Appropriation Act, which preceded enactment of the 1987 Authorization Act. Section 1201(a) of the 1987 Authorization Act did not impliedly repeal section 9085 of the 1987 DOD Appropriations Act. Rather the two statutes can be 'harmonized.' The rule of statutory construction which requires consideration of 'the last Act passed' only applies to statutes which are inconsistent.

"Accordingly, the Navy has not used interport differential costs as an evaluation factor for proposals for West Coast ship repair and overhaul solicitations during FY 1987. The Navy intends to use interport differential charges on the West Coast in FY 88, unless, of course, there is a similar funding limitation in the FY 88 Appropriations Act."

The legal issue presented is whether section 1201, as the statute later in time, impliedly repealed section 9085. If the statutes are irreconcilable, the second enactment is taken to represent a purposeful intention by Congress to supersede its earlier enactment, unless the record demonstrates other reasons for the congressional action.

However, the conclusion that two statutes are "irreconcilable" necessarily implies that a prior unsuccessful attempt has been made to interpret the statutes in such a way as to give effect to both. Absent a contrary and clearly expressed intention, courts are not free to pick and choose among congressional enactments and will give effect to each statute if a construction exists that reasonably preserves their sense and purpose. Ruckelhaus v. Monsanto, 467 U.S. 986 (1984); Andrus v. Glover Construction Co., 446 U.S. 608 (1980). We have previously expressed the view that provisions of an authorization act should be read in concert with those of the appropriation act unless they are clearly inconsistent. B-193282, Dec. 21, 1978.

Thus, our inquiry should focus initially on whether Congress intended that section 1201(a) repeal section 9085 and, if not, whether sections 1201(a) and 9085 can be read harmoniously. Only if no reasonable and harmonious

interpretation is possible would one conclude the statutes are irreconciliable and subject to the "last in time prevails" rule, and then, only to the extent of the irreconciliable conflict. Posadas v. National City Bank, 296 U.S. 497, 503-504 (1936).

Our review of the legislative history of section 1201(a) uncovered no evidence that suggests that Congress intended section 1201(a) repeal section 9085. Indeed, we have found no discussion in the legislative history of section 1201(a) or section 9085 that addresses the relationship of one to the other. As discussed below, we are convinced by the facts and circumstances surrounding the enactment of the two statutes, as well as other provisions of section 1201, that Congress did not intend to repeal section 9085.

First, section 1201(b) expressly repealed a provision in the DOD Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1220 (December 19, 1985), identical to section 9085, /2/ but did not specifically repeal section 9085. Since Congress had the means at hand to specifically repeal 9085, but failed to do so, the implication is that Congress intended to leave section 9085 unaffected. /3/

Second, the dates and circumstances surrounding the enactment of DOD's 1987 authorization act do not support an inference of implied repeal. Generally, Congress is expected to appropriate funds based on a preexisting authorization. /4/ Here, as one would expect, congressional action on the DOD 1987 authorization preceded consideration of the 1987 appropriation act. However, at the beginning of fiscal year 1987, because of the funding needs of the government, consideration and enactment of the 1987 Continuing Resolution containing the DOD 1987 appropriations act surged ahead of the 1987 authorization in the legislative process. See The Congressional Quarterly, Vol. 44, No. 42, p. 2584 (1986). DOD's 1987 appropriations act was presented to the President for signature first because it was part of H.J. Res. 738, a joint resolution making continuing appropriations for the entire federal government for fiscal year 1987. Absent such legislation, the federal government would have had to "shut down" due to a lack of budget authority.

Congress consistently took action on the authorization bill before the appropriations bill throughout the legislative process. /5/ Had this sequence continued, the authorization bill would have been enacted into law before the appropriations bill. However, Congress accelerated passage of the appropriations bill to resolve the funding needs of the federal government, thereby delaying consideration and passage of authorization bill until after passage of the appropriations bill.

Thus, this deliberative process was disrupted by the paramount need to appropriate funds for the operation of government. It never reached the point of deciding whether all foreseeable costs or all such costs except those incurred on the West Coast should be considered in deciding to whom contracts should be awarded. In these circumstances, we are not prepared to grant full effect to one statute by attributing to Congress an intention that is unsupported by both the factual record and the legislative history.

Having concluded that Congress did not clearly intend that section 1201(a) repeal section 9085, we next look to whether these provisions can be construed harmoniously. We think the construction of sections 1201(a) and 9085 adopted by the Navy preserves, as reasonably as possible under the circumstances, the sense and purpose of the two statutes. As you know, section 1201(a) amends section

7299a (relating to the construction of combatant and escort vessels and assignment of naval vessel projects) of title 10, United States Code, by adding a new subsection (c). Title 10 has been codified and enacted into positive law by section 1 of the act of August 19, 1956, c. 1041, 70A Stat. 1. For this reason, section 7299a(c) is permanent legislation requiring, by its terms, that the Navy consider foreseeable costs in the award of overhaul contracts.

Section 9085, however, is temporary in effect and limited geographically to West Coast contracts. For a provision in an appropriation act to be construed as permanent, the statutory language or the nature of the provision must unambiguously indicate that was the intent of Congress. Generally, this is done where the statute uses words of futurity (e.g., "hereafter" or "after the date of approval of this act") that clearly manifest an intention of future applicability and effect. See 36 Comp.Gen. 434 (1956). However, the use of words of futurity not essential if the permanent character of the legislation is otherwise demonstrates Congress' intent that the provision be permanent law. 085 and its legislative successor and predecessors indicates that section 9085 was intended to be temporary. /6/

Thus, as the Navy maintains, the two provisions can be construed to give effect to both by reading section 9085 as temporarily exempting West Coast Navy ship overhaul contracts from the requirements of section 1201(a), the permanent legislation. In other words, the permanent legislation requires that contracts for Navy ship overhauls must consider foreseeable costs unless the overhaul is performed on the West Coast and funded with fiscal year 1987 appropriations, in which case section 9085 prohibits consideration of the foreseeable costs.

Because we find no indication that Congress intended section 1201(a) to impliedly repeal section 9085 and in light of the Navy's harmonious construction of the two statutes, the rule of statutory construction requiring consideration of the "last Act passed" is not applicable.

An identical opinion has been provided Senator Wilson. By separate letter, we are advising the Secretary of the Navy of our opinion.

/1/ The funding limitation contained in Sec 9085 was reenacted into law as section 8140 of the DOD Appropriations Act, 1988, Put. L. No. 100-202, 101 Stat. 1329-88.

/2/ We accept the Navy's conclusion that the "foreseeable costs" referred to in secion 1201(a) are identical to the "interport differential" referred to in section 9085. Support for this conclusion exists in the legislative history of section 9085. Section 9085 first appeared in law as section 8070 of the Supplemental Appropriateions Act, 1985, Pub. L. No. 99-88, 99 Stat. 3112 (August 15, 1985). The House version of the bill did not have a provision similar to section 8070. See H.R. Rep. No. 99-142, 99th Cong., 1st Sess. 45 (1985). Nor did the House and Senate conference reports contain any useful discussion of section 8070. See H.R. Rep. No. 99-236, 99th Cong., 1st Sess. 32 (1985). The Senate report pertaining to this act uses the terms "foreseeable costs" and "interport differential": interchangeable. See S. Rep. No. 99-82, 99th Cong., 1st Sess. 67 (1985).

/3/ The provision that was to become section 1201(a) was part of the authorization bill which passed the House on August 9, 1986 (the Senate bill which was passed in September did not contain such a provision). Meanwhile, the

House appropriations bill, reported out from committee on August 14 and passed by the full House in September, contained a clause identical to section 9085. The Senate appropriations bill as passed on October 3 contained the same provision, so that it would have been clear to conferees on the DOD authorization bill that the final version of the appropriations bill would have in it language differing from section 1201(a). Yet, the authorization bill conferees did nothing to counter the appropriations language.

/4/ Section 138(a) of title 10 of the United State Code provides that no funds may be expended for the armed forces unless the funds have been authorized by law.

/5/ DOD's 1987 authorization bills were introduced in the House and the Senate in March and June of 1986. The bills that ultimately became DOD's 1987 appropriations act were both introduced and reported in the House and Senate in August and September. The House and Senate passed their respective authorization bills in August and September 1986. The House and Senate passed their respective appropriations bills in September and October 1986. The authorization bill was reported out of conference on October 14, 1986. The conference report for the appropriations bill was dated October 15, 1986.

/6/ H.R. Rep. No. 99-1005, 99th Cong., 1st Sess. 277 (1986) and S. Rep. No. 99-176, 99th Cong., 1st Sess. 3541 (1985). H.R. Rep. No. 100 446, 100th Cong., 1st Sess. 674 (1987).